

## Chapter 9

# Prohibition Orders and withdrawal of approval

## 9.1 Introduction

### 9.1.1

The *FCA's* power under section 56 of the *Act* to prohibit individuals who are not fit and proper from carrying out functions in relation to *regulated activities* helps the *FCA* to work towards achieving its *statutory objectives*. The *FCA* may exercise this power to make a *prohibition order* where it considers that, to achieve any of those objectives, it is appropriate either to prevent an individual from performing any function in relation to *regulated activities*, or to restrict the functions which he may perform.

### 9.1.2

The *FCA's* effective use of the power under section 63 of the *Act* to withdraw approval from an *approved person* will also help ensure high standards of regulatory conduct by preventing an *approved person* from continuing to perform the *controlled function* to which the approval relates if he is not a fit and proper *person* to perform that function. Where it considers this is appropriate, the *FCA* may prohibit an *approved person*, in addition to withdrawing their approval.

## 9.2 The FCA's general policy in this area

- 9.2.1 In deciding whether to make a *prohibition order* and/or, in the case of an *approved person*, to withdraw its approval, the *FCA* will consider all the relevant circumstances including whether other enforcement action should be taken or has been taken already against that individual by the *FCA*. As is noted below, in some cases the *FCA* may take other enforcement action against the individual in addition to seeking a *prohibition order* and/or withdrawing its approval. The *FCA* will also consider whether enforcement action has been taken against the individual by other enforcement agencies or *designated professional bodies*.
- 9.2.2 The *FCA* has the power to make a range of *prohibition orders* depending on the circumstances of each case and the range of *regulated activities* to which the individual's lack of fitness and propriety is relevant. Depending on the circumstances of each case, the *FCA* may seek to prohibit individuals from performing any class of function in relation to any class of *regulated activity*, or it may limit the *prohibition order* to specific functions in relation to specific *regulated activities*. The *FCA* may also make an order prohibiting an individual from being employed by a particular *firm*, type of *firm* or any *firm*.
- 9.2.3 The scope of a *prohibition order* will depend on the range of functions which the individual concerned performs in relation to *regulated activities*, the reasons why he is not fit and proper and the severity of risk which he poses to *consumers* or the market generally.
- 9.2.4 Where the *FCA* issues a *prohibition order*, it may indicate in the *decision notice* or *final notice* that it would be minded to revoke the order on the application of the individual in the future, in the absence of new evidence that the individual is not fit and proper. If the *FCA* gives such an indication, it will specify the number of years after which it would be minded to revoke or vary the prohibition on an application. However, the *FCA* will only adopt this approach in cases where it considers it appropriate in all the circumstances. In deciding whether to adopt this approach, the factors the *FCA* may take into account include, but are not limited to, where appropriate, the factors at paragraphs ■ 9.3.2 and at ■ 9.5.1.
- The *FCA* would not be obliged to revoke an order after the specified period even where it gave such an indication. Further, if an individual's *prohibition order* is revoked, he would still have to satisfy the *FCA* as to his fitness for a particular role in relation to any future application for approval to perform a *controlled function*.

### 9.2.5

Paragraphs ■ 9.3.1 to ■ 9.3.7 set out additional guidance on the *FCA's* approach to making *prohibition orders* against *approved persons* and/or withdrawing such persons' approvals. Paragraphs ■ 9.5.1 to ■ 9.5.2 set out additional guidance on the *FCA's* approach to making *prohibition orders* against other individuals.

## 9.3 Prohibition orders and withdrawal of approval - approved persons

**9.3.1** When the *FCA* has concerns about the fitness and propriety of an *approved person*, it may consider whether it should prohibit that *person* from performing functions in relation to *regulated activities*, withdraw its approval, or both. In deciding whether to withdraw its approval and/or make a *prohibition order*, the *FCA* will consider in each case whether its *statutory objectives* can be achieved adequately by imposing disciplinary sanctions, for example, *public censures* or financial penalties, or by issuing a private warning.

**9.3.2** When the *FCA* decides whether to make a *prohibition order* against an *approved person* and/or withdraw their approval, the *FCA* will consider all the relevant circumstances of the case. These may include, but are not limited to those set out below.

- (1) The matters set out in section 61(2) of the *Act*.
- (2) Whether the individual is fit and proper to perform functions in relation to *regulated activities*. The criteria for assessing the fitness and propriety of *approved persons* are set out in ■ FIT 2.1 (Honesty, integrity and reputation); ■ FIT 2.2 (Competence and capability) and ■ FIT 2.3 (Financial soundness).
- (3) Whether, and to what extent, the *approved person* has:
  - (a) failed to comply with the *Statements of Principle* or *COCON*, as applicable, issued by the *FCA* with respect to the conduct of *approved persons*; or
  - (b) been knowingly concerned in a contravention by the relevant *firm* of a requirement imposed on the *firm* by or under the *Act* (including the *Principles* and other *rules*), the *AIFMD UK regulation* or any qualifying provision specified, or of a description specified, for the purpose of section 66(2) by the Treasury by order.
- (4) Whether the *approved person* has engaged in *market abuse*.
- (5) The relevance and materiality of any matters indicating unfitness.
- (6) The length of time since the occurrence of any matters indicating unfitness.

- (7) The particular *controlled function* the *approved person* is (or was) performing, the nature and activities of the *firm* concerned and the markets in which he operates.
- (8) The severity of the risk which the individual poses to *consumers* and to confidence in the *financial system*.
- (9) The previous disciplinary record and general compliance history of the individual including whether the *FCA*, any *previous regulator*, *designated professional body* or other domestic or international regulator has previously imposed a disciplinary sanction on the individual.
- (10) Where the *approved person* is an *SMF manager*, whether they would be a fit and proper person to perform functions in relation to *regulated activities* if the *FCA* varied their approval by imposing one or more conditions. If so, whether it is appropriate for the *FCA* to exercise its power to impose such conditions, instead of making a prohibition order or withdrawing the *approved person's* approval.

### 9.3.3

The *FCA* may have regard to the cumulative effect of a number of factors which, when considered in isolation, may not be sufficient to show that the individual is not fit and proper to continue to perform a *controlled function* or other function in relation to *regulated activities*. It may also take account of the particular *controlled function* which an *approved person* is performing for a *firm*, the nature and activities of the *firm* concerned and the markets within which it operates.

### 9.3.4

Due to the diverse nature of the activities and functions which the *FCA* regulates, it is not possible to produce a definitive list of matters which the *FCA* might take into account when considering whether an individual is not a fit and proper *person* to perform a particular, or any, function in relation to a particular, or any, *firm*.

### 9.3.5

The following are examples of types of behaviour which have previously resulted in the *FCA* the deciding to issue a *prohibition order* or withdraw the approval of an *approved person*:

- (1) Providing false or misleading information to the *FCA*; including information relating to identity, ability to work in the United Kingdom, and business arrangements;
- (2) Failure to disclose material considerations on application forms, such as details of County Court Judgments, criminal convictions and dismissal from employment for regulatory or criminal breaches. The nature of the information not disclosed can also be relevant;
- (3) Severe acts of dishonesty, e.g. which may have resulted in financial crime;
- (4) Serious lack of competence; and
- (5) Serious breaches of the *APER* or *COCON*, for *approved persons*, such as failing to make terms of business regarding fees clear or actively misleading clients about fees; acting without regard to

instructions; providing misleading information to clients; consumers or third parties; giving clients poor or inaccurate advice; using intimidating or threatening behaviour towards clients and former clients; failing to remedy breaches of the general prohibition or to ensure that a *firm* acted within the scope of its permissions.

**9.3.6** Certain matters that do not fit squarely, or at all, within the matters referred to above may also fall to be considered. In these circumstances the *FCA* will consider whether the conduct or matter in question is relevant to the individual's fitness and propriety.

**9.3.7** Where it considers it is appropriate to withdraw an individual's approval to perform a *controlled function* within a particular *firm*, it will also consider, at the very least, whether it should prohibit the individual from performing that function more generally. Depending on the circumstances, it may consider that the individual should also be prohibited from performing other functions.

**9.3.8** The *FCA* will consult the *PRA* before withdrawing an approval given by the *PRA*.

### 9.4 Prohibition orders against exempt persons and members of professional firms

#### 9.4.1

In cases where it is considering whether to exercise its power to make a *prohibition order* against an individual performing functions in relation to *exempt regulated activities* by virtue of an exemption from the *general prohibition* under Part XX of the *Act*, the *FCA* will consider whether the particular unfitness might be more appropriately dealt with by making an order disapplying the exemption using its power under section 329 of the *Act*. In most cases where the *FCA* is concerned about the fitness and propriety of a specific individual in relation to *exempt regulated activities* by virtue of an exemption under Part XX of the *Act*, it will be more appropriate to make an order prohibiting the individual from performing functions in relation to *exempt regulated activities* than to make a disapplication order.

#### 9.4.2

When considering whether to exercise its power to make a *prohibition order* against an *exempt person*, the *FCA* will consider all relevant circumstances including, where appropriate, the factors set out in paragraph ■ 9.3.2.



## 9.5 Prohibition orders against other individuals

### 9.5.1

Where the *FCA* is considering making a *prohibition order* against an individual other than an individual referred to in paragraphs ■ 9.3.1 to ■ 9.3.7, the *FCA* will consider the severity of the risk posed by the individual, and may prohibit the individual where it considers this is appropriate to achieve one or more of its *statutory objectives*.

### 9.5.2

When considering whether to exercise its power to make a *prohibition order* against such an individual, the *FCA* will consider all the relevant circumstances of the case. These may include, but are not limited to, where appropriate, the factors set out in paragraph ■ 9.3.2.

## 9.6 Applications for variation or revocation of prohibition orders

### 9.6.1

When considering whether to grant or refuse an application to revoke or vary a *prohibition order*, the *FCA* will consider all the relevant circumstances of a case. These may include, but are not limited to:

- (1) the seriousness of the misconduct or other unfitness that resulted in the order;
- (2) the amount of time since the original order was made;
- (3) any steps taken subsequently by the individual to remedy the misconduct or other unfitness;
- (4) any evidence which, had it been known to the *FCA* at the time, would have been relevant to the *FCA*'s decision to make the *prohibition order*;
- (5) all available information relating to the individual's honesty, integrity or competence since the order was made, including any repetition of the misconduct which resulted in the prohibition order being made;
- (6) where the *FCA*'s finding of unfitness arose from incompetence rather than from dishonesty or lack of integrity, evidence that this unfitness has been or will be remedied; for example, this may be achieved by the satisfactory completion of relevant training and obtaining relevant qualifications, or by supervision of the individual by his employer;
- (7) the financial soundness of the individual concerned; and
- (8) whether the individual will continue to pose the level of risk to *consumers* or confidence in the *financial system* which resulted in the original prohibition if it is lifted.

### 9.6.2

When considering whether to grant or refuse an application to revoke or vary a *prohibition order*, the *FCA* will take into account any indication given by the *FCA* in the *final notice* that it is minded to revoke or vary the *prohibition order* on application after a certain number of years (see paragraph ■ 9.2.4).

### 9.6.3

If the individual applying for a revocation or variation of a prohibition order proposes to take up an offer of employment to perform a *controlled*

*function*, the *FCA* will take this into account when considering whether to grant or refuse the application.

### 9.6.4

The *FCA* will not generally grant an application to vary or revoke a *prohibition order* unless it is satisfied that: the proposed variation will not result in a reoccurrence of the risk to *consumers* or confidence in the *financial system* that resulted in the order being made; and the individual is fit to perform functions in relation to *regulated activities* generally, or to those specific *regulated activities* in relation to which the individual has been prohibited. The *FCA* will assess the individual's fitness and propriety to perform these functions on the basis of the criteria in ■ FIT 2.1 (Honesty, integrity and reputation), ■ FIT 2.2 (Competence and capability) and ■ FIT 2.3 (Financial soundness).

### 9.6.5

The *FCA* will consult the *PRA* before varying or revoking a prohibition order if, as a result of the variation or revocation, an individual will either be prohibited from, or no longer be prohibited from, a function of interest to the *PRA* as defined at section 56(7B) of the *Act*.



**9.7 Other powers that may be relevant when the FCA is considering whether to exercise its power to make a prohibition order**

**9.7.1**

In appropriate cases, the *FCA* may take other action against an individual in addition to making a *prohibition order* and/or withdrawing its approval, including the use of its powers to: impose a financial penalty or issue a *public censure*; apply for an *injunction* to prevent dissipation of assets; stop any continuing misconduct; order restitution; apply for an insolvency order or an order against debt avoidance; and/or prosecute certain criminal offences.

### 9.8 The effect of the FCA's decision to make a prohibition order

#### 9.8.1

The FCA may consider taking disciplinary action against a *firm* that has not taken reasonable care, as required by section 56(6) of the Act, to ensure that none of that *firm's* functions in relation to carrying on of a *regulated activity* is performed by a *person* who is prohibited from performing the function by a *prohibition order*. The FCA considers that a search by a *firm* of the *Financial Services Register* is an essential part of the statutory duty to take reasonable care to ensure that *firms* do not employ or otherwise permit prohibited individuals to perform functions in relation to *regulated activities*. In addition, the FCA expects *firms* to check the *Financial Services Register* when making applications for approval under section 59 of the Act. More generally, if a *firm's* search of the *Financial Services Register* reveals no record of a prohibition order, the FCA will consider taking action for breach of section 56(6) only where the *firm* had access to other information indicating that a prohibition order had been made.



## 9.9 The effect of the FCA's decision to withdraw approval

- 9.9.1** When the *FCA's* decision to withdraw an approval has become effective, the position of the *firm* which applied for that approval depends on whether it directly employs the *person* concerned, or whether the *person* is employed by one of its contractors.
- 9.9.2** Section 59(1) is relevant where the *firm* directly employs the *person* concerned. Under the provision, a *firm* ('A') must take reasonable care to ensure that no *person* performs a *controlled function* under an *arrangement* entered into by A in relation to the carrying on by it of a *regulated activity*, unless the *appropriate regulator* (as defined in section 59(4) of the *Act*) approves the performance by that *person* of the *controlled function* to which the approval relates. Therefore, if the *firm* continues to employ the *person* concerned to carry out a *controlled function*, it will be in breach of section 59(1) and the *FCA* may take enforcement action against it (save where the *firm* concerned is a *PRA-authorised person* and the approval concerned falls to be given by the *PRA*).
- 9.9.3** Section 59(2) is relevant where the *person* is employed by a contractor of the *firm*. It requires a *firm* ('A') to take reasonable care to ensure that no *person* performs a *controlled function* under an arrangement entered into by a contractor of A in relation to the carrying on by A of a *regulated activity*, unless the *appropriate regulator* (as defined in section 59(4) of the *Act*) approves the performance by that *person* of the *controlled function* to which the approval relates. Therefore, if a contractor of the *firm* employs the *person* concerned, and the contractor continues to employ the *person* to carry out a *controlled function*, the *firm* itself will be in breach of section 59(2) unless it has taken reasonable care to ensure that this does not happen. The *FCA* may take enforcement action against a *firm* that breaches this requirement (save where the *firm* concerned is a *PRA-authorised person* and the approval concerned falls to be given by the *PRA*).
- 9.9.4** *Firms* should be aware of the potential effect that these provisions may have on their contractual relationships with *approved persons* employed by them and with contractors engaged by them, and their obligations under those contracts.