

**ENFORCEMENT POWERS (FINANCIAL SERVICES ACT 2010)  
INSTRUMENT 2010**

**Powers exercised**

- A. The Financial Services Authority makes this instrument in the exercise of the following powers and related provisions in the Financial Services and Markets Act 2000:
- (1) section 63C(1) (Statement of policy);
  - (2) section 69(1) (Statement of policy);
  - (3) section 131J(1) (Statement of policy);
  - (4) section 157(1) (Guidance);
  - (5) section 210(1) (Statements of policy); and
  - (6) section 395(5) (The Authority's procedures).

**Commencement**

- B. This instrument comes into force on 6 August 2010.

**Amendments to the Handbook**

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

**Amendments to the Enforcement Guide**

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

**Citation**

- F. This instrument may be cited as the Enforcement Powers (Financial Services Act 2010) Instrument 2010.

By order of the Board  
22 July 2010

## Annex A

### Amendments to the Glossary of definitions

In this Annex, underlining indicates new text and striking through indicates deleted text.

*breach*

in *DEPP*:

...

- (4) behaviour amounting to *market abuse*, or to *requiring or encouraging market abuse*, in respect of which the *FSA* takes action pursuant to section 123 (Power to impose penalties in cases of market abuse) of the *Act*; ~~or~~
- (5) a contravention of any directly applicable *EU* regulation made under ~~MiFID~~ MiFID; or
- (6) a contravention in respect of which the *FSA* is empowered to take action pursuant to section 131G (Breach of short selling rules etc: Power to impose penalty or issue censure) of the *Act*.

**Annex B**

**Amendments to the Decision Procedure and Penalties manual (DEPP)**

In this Annex, underlining indicates new text and striking through indicates deleted text, unless otherwise stated.

**1.1 Application and Purpose**

Application

1.1.1 G This manual (*DEPP*) is relevant to *firms, approved persons* and other *persons*, whether or not they are regulated by the *FSA*. It sets out:

...

(2) the *FSA*'s policy with respect to the imposition and amount of penalties under the *Act* (see *DEPP* 6);

(2A) the *FSA*'s policy with respect to the imposition of suspensions or restrictions, and the period for which those suspensions or restrictions are to have effect, under the *Act* (see *DEPP* 6A);

...

Purpose

1.1.2 G The purpose of *DEPP* is to satisfy the requirements of sections 63C(1), 69(1), 93(1), 124(1), 131J(1), 169(7), 210(1) and 395 of the *Act* that the *FSA* publish the statements of procedure or policy referred to in *DEPP* 1.1.1G.

...

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

...

Section of the Act	Description	Handbook reference	Decision maker
...			
63(3)/(4)	when the <i>FSA</i> is proposing or deciding to withdraw approval from an <i>approved person</i> *		<i>RDC</i>

63B(1)/(3)	<u>when the FSA is proposing or deciding to impose a penalty on a person under section 63A*</u>		<u>RDC</u>
...			
126(1)/ 127(1)	when the FSA is proposing or deciding to impose a sanction for <i>market abuse</i> *		RDC
<u>131H(1)/ (4)</u>	<u>when the FSA is proposing or deciding to take action against a person under section 131G*</u>		<u>RDC</u>
...			
207(1)/ 208(1)	When, <u>in respect of an authorised person</u> , the FSA is proposing or deciding to publish a statement <del>in respect of an authorised person</del> (under section 205) or impose a financial penalty <del>on an authorised person</del> (under section 206) <u>or suspend a permission or impose a restriction in relation to the carrying on of a regulated activity (under section 206A)*</u>		RDC
...			

## 6.1 Introduction

- 6.1.1 G *DEPP* 6 includes the FSA's statement of policy with respect to the imposition and amount of penalties under the *Act*, as required by sections 63C(1), 69(1), 93(1), 124(1), 131J(1) and 210(1) of the *Act*.

...

## 6.2 Deciding whether to take action

...

- 6.2.9 G Where disciplinary action is taken against an *approved person* the onus will be on the FSA to show that the *approved person* has been guilty of misconduct.

Action under section 63A of the Act against persons that perform a controlled

function without approval

- 6.2.9A G In addition to the general factors outlined in DEPP 6.2.1G, there are some additional considerations that the FSA will have regard to when deciding whether to take action against a *person* that performs a *controlled function* without approval contrary to section 63A of the Act.
- (1) The conduct of the *person*. The FSA will take into consideration whether, while performing *controlled functions* without approval, the *person* committed misconduct in respect of which, if he had been approved, the FSA could have taken action pursuant to section 66 of the Act and, if so, the seriousness of that misconduct.
  - (2) The extent to which the *person* could reasonably be expected to have known that he was performing a *controlled function* without approval. The circumstances in which the FSA would expect to be satisfied that a *person* could reasonably be expected to have known that he was performing a *controlled function* without approval include:
    - (a) the *person* had previously performed a similar role at the same or another *firm* for which he had been approved;
    - (b) the *person's* *firm* or another *firm* had previously applied for approval for the *person* to perform the same or a similar *controlled function*;
    - (c) the *person's* seniority or experience was such that he could reasonably be expected to have known that he was performing a *controlled function* without approval; and
    - (d) the *person's* *firm* had clearly apportioned responsibilities so that the *person's* role, and the responsibilities associated with it, were clear.
  - (3) The length of the period during which the *person* performed a *controlled function* without approval.
  - (4) Whether the *person* is an individual.
  - (5) The appropriateness of taking action against the *person* instead of, or in addition to, taking action against an *authorised person*. In assessing this, the FSA will take into consideration the extent of the culpability of an *authorised person* for the *person* performing a *controlled function* without approval. For example, a relevant factor may be that an *authorised person* decided that the *person* did not need to obtain approval and it was reasonable for the *person* to rely on the *authorised person's* judgment.
  - (6) The *person's* position and responsibilities. The more senior the *person* that performs a *controlled function* without approval, the

more seriously the FSA is likely to view his behaviour, and therefore the more likely it is to take action against the person.

...

## 6.5B The five steps for penalties imposed on individuals in non-market abuse cases

...

Step 2 – the seriousness of the ~~breach~~ breach

...

6.5B.2 G ...

(9) Factors relating to the nature of a *breach* by an individual include:

...

(n) whether the individual took any steps to comply with *FSA rules*, and the adequacy of those steps; ~~and~~

(o) in the context of contraventions of Part VI of the *Act*, the extent to which the *behaviour* which constitutes the contravention departs from current market practice;

(p) in relation to a contravention of section 63A of the *Act*, whether the individual's only misconduct was to perform a *controlled function* without approval;

(q) in relation to a contravention of section 63A of the *Act*, whether the individual performed *controlled functions* without approval and, while doing so, committed misconduct in respect of which, if the individual had been an *approved person*, the *FSA* would have been empowered to take action pursuant to section 66 of the *Act*; and

(r) in relation to a contravention of section 63A of the *Act*, the extent to which the individual could reasonably be expected to have known that he was performing a *controlled function* without approval. The circumstances in which the *FSA* would expect to be satisfied that a *person* could reasonably be expected to have known that he was performing a *controlled function* without approval include:

(i) the *person* had previously performed a similar role at the same or another *firm* for which he had been approved;

(ii) the *person's firm* or another *firm* had previously applied for approval for the *person* to perform the same or a similar *controlled function*;

(iii) the person's seniority or experience was such that he could reasonably be expected to have known that he was performing a controlled function without approval; and

(iv) the person's firm had clearly apportioned responsibilities so the person's role, and the responsibilities associated with it, were clear.

...

(13) Factors which are likely to be considered 'level 1 factors', 'level 2 factors' or 'level 3 factors' include:

...

(c) there was no, or limited, actual or potential effect on the orderliness of, or confidence in, markets as a result of the *breach*; ~~and~~

(d) the *breach* was committed negligently or inadvertently; and

(e) in relation to a contravention of section 63A of the Act, the individual's only misconduct was to perform a controlled function without approval.

Step 3 – mitigating and aggravating factors

6.5B.3 G ...

(2) The following list of factors may have the effect of aggravating or mitigating the *breach*:

...

(l) whether the FSA publicly called for an improvement in standards in relation to the behaviour constituting the *breach* or similar behaviour before or during the occurrence of the *breach*; ~~and~~

(m) whether the individual agreed to undertake training subsequent to the *breach*; and

(n) in relation to a contravention of section 63A of the Act, whether the person's firm or another firm has previously withdrawn an application for the person to perform the same or a similar controlled function or has had such an application rejected by the FSA.

...

Insert the following new chapter after DEPP 6. The text is not underlined.

## **6A The power to impose a suspension or restriction**

### **6A.1 Introduction**

- 6A.1.1 G *DEPP 6A* sets out the *FSA*'s statement of policy with respect to the imposition of suspensions or restrictions, and the period for which those suspensions or restrictions are to have effect, under the *Act*, as required by sections 69(1) and 210(1) of the *Act*.
- 6A.1.2 G For the purposes of *DEPP 6A*, "suspension" refers both to the suspension of any *permission* which an *authorised person* has to carry on a *regulated activity* (under section 206A of the *Act*), and the suspension of any approval of the performance by an *approved person* of any function to which the approval relates (under section 66 of the *Act*); and "restriction" refers both to limitations or other restrictions in relation to the carrying on of a *regulated activity* by an *authorised person* (under section 206A of the *Act*), and to limitations or other restrictions in relation to the performance by an *approved person* of any function to which any approval relates (under section 66 of the *Act*).
- 6A.1.3 G The power to impose a suspension or a restriction is a disciplinary measure which the *FSA* may use in addition to, or instead of, imposing a financial penalty or issuing a *public censure*. The principal purpose of imposing a suspension or a restriction is to promote high standards of regulatory and/or market conduct by deterring *persons* who have committed *breaches* from committing further *breaches*, helping to deter other *persons* from committing similar *breaches*, and demonstrating generally the benefits of compliant behaviour. Suspensions and restrictions are therefore tools that the *FSA* may employ to help it to achieve its *regulatory objectives*.  
Examples of restrictions that we may impose include:
- (1) we may limit an *authorised person's* carrying on of a *regulated activity* so that they can only sell certain products or provide certain services;
  - (2) we may restrict an *approved person's* performance of their *controlled functions* so that they can only give advice to *consumers* or deal in certain products if they are appropriately supervised.
- 6A.1.4 G As the power to impose a suspension or a restriction is a disciplinary measure, where the *FSA* considers it necessary to take action, for example, to protect *consumers* from an *authorised person*, the *FSA* will seek to cancel or vary the *authorised person's permissions*. If the *FSA* has concerns with a *person's* fitness to be approved, and considers it necessary to take action, the *FSA* will seek to prohibit the *approved person* or withdraw its approval.



## 6A.2 Deciding whether to take action

- 6A.2.1 G The *FSA* will consider the full circumstances of each case and determine whether it is appropriate to impose a suspension or restriction. The *FSA* will usually make this decision at the same time as it determines whether or not to impose a financial penalty or a *public censure*.
- 6A.2.2 G The *FSA* will take into account relevant factors in deciding whether it is appropriate to impose a suspension or restriction. These may include factors listed in *DEPP* 6.2. There may also be other factors, not listed in *DEPP* 6.2, that are relevant.
- 6A.2.3 G The *FSA* will consider it appropriate to impose a suspension or restriction where it believes that such action will be a more effective and persuasive deterrent than the imposition of a financial penalty alone. This is likely to be the case where the *FSA* considers that direct and visible action in relation to a particular *breach* is necessary. Examples of circumstances where the *FSA* may consider it appropriate to impose a suspension or restriction include:
- (1) where the *FSA* (or any *previous regulator*) has taken any previous disciplinary action resulting in adverse findings against the *person*;
  - (2) where the *FSA* has previously taken action in respect of similar *breaches* and has failed to improve industry standards;
  - (3) where the *person* has failed properly to carry out an agreed redress package or other agreed remedial measures;
  - (4) where the misconduct appears to be widespread across a number of individuals across a particular business area (suggesting a poor compliance culture);
  - (5) where the *person's* competitive position in the market has improved as a result of the *breach*;
  - (6) if, in accordance with *DEPP* 6.5D, the *FSA* considers that a proposed penalty would cause the subject of enforcement action serious financial hardship and that it is appropriate to reduce the proposed penalty.
- 6A.2.4 G The *FSA* expects usually to suspend or restrict a *person* from carrying out activities directly linked to the *breach*. However, in certain circumstances the *FSA* may also suspend or restrict a *person* from carrying out activities that are not directly linked to the *breach*, for example, where an *authorised person's* relevant business area no longer exists or has been restructured.

## 6A.3 Determining the appropriate length of the period of suspension or restriction

6A.3.1 G The *FSA* will consider all the relevant circumstances of a case when it determines the length of the period of suspension or restriction (if any) that is appropriate for the *breach* concerned, and is also a sufficient deterrent. Set out below is a list of factors that may be relevant for this purpose. The list is not exhaustive: not all of these factors may be applicable in a particular case, and there may be other factors, not listed, that are relevant.

6A.3.2 G The following factors may be relevant to determining the appropriate length of the period of suspension or restriction to be imposed on a *person* under the *Act*:

(1) Deterrence

When determining the appropriate length of the period of suspension or restriction, the *FSA* will have regard to the principal purpose for which it imposes sanctions, namely to promote high standards of regulatory and/or market conduct by deterring *persons* who have committed *breaches* from committing further *breaches* and helping to deter other *persons* from committing similar *breaches*, as well as demonstrating generally the benefits of compliant business.

(2) The seriousness of the breach

The *FSA* will have regard to the seriousness of the breach. In assessing this, it will consider the impact and nature of the *breach*, and whether it was committed deliberately or recklessly. Where the *breach* was committed by an *authorised person*, relevant factors may include those listed in *DEPP* 6.5A.2G(6) to (9). Where the *breach* was committed by an *approved person*, relevant factors may include those listed in *DEPP* 6.5B.2G(8) to (11). There may also be other factors, not listed in these sections, that are relevant.

(3) Aggravating and mitigating factors

The *FSA* will have regard to factors that may aggravate or mitigate a *breach*. Where the *breach* was committed by an *authorised person*, relevant factors may include those listed in *DEPP* 6.5A.3G(2). Where the *breach* was committed by an *approved person*, relevant factors may include those listed in *DEPP* 6.5B.3G(2). There may also be other factors, not listed in these sections, that are relevant.

(4) The impact of suspension or restriction on the person in breach

The following considerations may be relevant to the assessment of the impact of suspension or restriction on an *authorised person*:

- (a) the *authorised person*'s expected lost revenue and profits from not being able to carry out the suspended or restricted activity;
- (b) the cost of any measures the *authorised person* must

undertake to comply with the suspension or restriction;

- (c) potential economic costs, for example, the payment of salaries to employees who will not work during the period of suspension or restriction or the payment of compensation to *consumers* who will suffer loss as a result of the suspension or restriction;
- (d) the effect on other areas of the *authorised person's* business; and
- (e) whether the suspension or restriction would cause the *authorised person* serious financial hardship.

The following considerations may be relevant to the assessment of the impact of suspension or restriction on an *approved person*:

- (f) the *approved person's* expected lost earnings from not being able to carry out the suspended or restricted activity; and
  - (g) whether the suspension or restriction would cause the *approved person* serious financial hardship.
- (5) The impact of suspension or restriction on persons other than the person in breach

The following considerations may be relevant to the assessment of the impact of suspension or restriction on *persons* other than the *person in breach*:

- (a) the extent to which *consumers* may suffer loss or inconvenience as a result of the suspension or restriction. For example, if it is difficult for *consumers* to switch to a competitor, a longer period of suspension or restriction is likely to have more impact; and
- (b) the impact of the suspension or restriction on markets.

6A.3.3 G The *FSA* may delay the commencement of the period of suspension or restriction. In deciding whether this is appropriate, the *FSA* will take into account all the circumstances of a case. Considerations that may be relevant in respect of an *authorised person* include:

- (1) the impact of the suspension or restriction on consumers;
- (2) any practical measures the *authorised person* needs to take before the period of suspension or restriction begins, for example, changes to its systems and controls to enable it to stop or limit the activity in question;
- (3) the impact of the suspension or restriction on other costs incurred by the *authorised person*, for example, cancelling suppliers or

suspending employees.

#### **6A.4 The interaction between the power to impose suspensions or restrictions and the power to impose penalties or public censures**

- 6A.4.1 G The deterrent effect and impact on a *person* of a suspension or restriction, by itself or in combination with a financial penalty, may be greater than where only a financial penalty is imposed. The *FSA* will consider the overall impact and deterrent effect of the sanctions it imposes when determining the level of penalty and the length of suspension or restriction.
- 6A.4.2 G The *FSA* expects usually to take the following approach in respect of the interaction between a suspension or restriction and a financial penalty or *public censure*:
- (1) The *FSA* will determine which sanction, or combination of sanctions, is appropriate for the *breach*.
  - (2) If the *FSA*, following the approach set out in *DEPP* 6.2, considers it appropriate to impose a financial penalty, it will calculate the appropriate level of the financial penalty, following the approach set out in *DEPP* 6.5 to *DEPP* 6.5D.
  - (3) If the *FSA*, following the approach set out in *DEPP* 6A.2, considers it appropriate to impose a suspension or restriction, it will calculate the appropriate length of the period of suspension or restriction, following the approach set out in *DEPP* 6A.3.
  - (4) Where the *FSA* considers it appropriate to impose both a financial penalty and a suspension or restriction, it will decide whether the combined impact on the *person* is likely to be disproportionate in respect to the *breach* and the deterrent effect of the sanctions.
  - (5) If the *FSA* considers the combined impact on the *person* is likely to be disproportionate, it will decide whether to reduce the period of suspension or restriction, the amount of the financial penalty or both, so that the combined impact of the sanctions is proportionate in relation to the *breach* and the deterrent effect of the sanctions. The *FSA* will decide which sanction to reduce after considering all the circumstances of the case.
  - (6) In deciding the final level of the financial penalty and the length of the period of suspension or restriction, the *FSA* will also take into account any representations by the *person* that the combined impact will cause them serious financial hardship. The *FSA* will take the approach set out in *DEPP* 6.5D in assessing this.
- 6A.4.3 G The *FSA* may depart from the approach set out in *DEPP* 6A.4.2G. For example, the *FSA* may at the outset consider that a financial penalty is the

only appropriate sanction for a *breach* but, having determined the appropriate level of financial penalty, may consider it appropriate to reduce the amount of the financial penalty for serious financial hardship reasons. In such a situation, the *FSA* may consider it appropriate to impose a suspension or restriction even if the *FSA* at the outset did not consider such a sanction to be appropriate. The *FSA* will take into account whether the *person* would suffer serious financial hardship in deciding the length of the period of suspension or restriction, and may decide not to impose a suspension or restriction if it considers such action would result in serious financial hardship.

...

**Schedule 4 Powers Exercised**

Sch 4.1 G

The following powers and related provisions in or under the <i>Act</i> have been exercised by the <i>FSA</i> to make the statements of policy in <i>DEPP</i> :	
	<u>Section 63C (Statement of policy)</u>
	...
	<u>Section 131J (Statement of policy)</u>
	...

## Annex C

## Amendments to the Enforcement Guide (EG)

In this Annex, underlining indicates new text and striking through indicates deleted text.

- 1.2 In the areas set out below, the *Act* expressly requires the FSA to prepare and publish statements of policy or procedure on the exercise of its enforcement and investigation powers and in relation to the giving of *statutory notices*:
- (1) section 63C requires the FSA to publish a statement of its policy on the imposition, and amount, of financial penalties on persons that perform a controlled function without approval;
  - (4) sections 69 and 210 require the FSA to publish statements of policy on the ~~imposition, and amount,~~ imposition, and amount, of financial penalties, suspensions or restrictions on firms and approved persons, the amount of financial penalties imposed, and the period for which suspensions or restrictions are to have effect;
  - ...
  - (3) section 124 requires the FSA to publish a statement of its policy on the imposition, and amount, of financial penalties for *market abuse*;
  - (3A) section 131J requires the FSA to publish a statement of its policy on the imposition, and amount, of financial penalties imposed under section 131G;
  - ...
  - ...
- 7.2 The FSA has the following powers to impose a financial penalty and to publish a *public censure*.
- (1) It may publish a statement:
    - ...
    - (e) where there has been *market abuse*, against a *person* under section 123 of the *Act*; ~~and~~
    - (ea) if a *person* has contravened any provision of *short selling rules*, or any requirement imposed on the *person* under section 131E or 131F, under section 131G of the *Act*; and
    - ...
  - (2) It may impose a financial penalty:
    - (a) on a *person* that performs a *controlled function* without approval,

under section 63A of the Act;

~~(a)~~ on an *approved person*, under section 66 of the Act;

(aa)

...

(c) where there has been *market abuse*, on any *person*, under section 123 of the Act; ~~and~~

(ca) on a *person* who has contravened any provision of *short selling rules*, or any requirement imposed on the *person* under section 131E or 131F, or any *person* who was knowingly concerned in the contravention, under section 131G of the Act; and

...