

**OVER-THE-COUNTER DERIVATIVES, CENTRAL COUNTERPARTIES AND  
TRADE REPOSITORIES INSTRUMENT 2013**

**WHEREAS:**

- A. The Authority has, in accordance with Article 5 of the Designation Order, appointed persons to exercise functions referred to in Article 5(1) of the Designation Order, which include the function of the Financial Conduct Authority of making rules, giving guidance and issuing codes and statements of policy.
- B. By virtue of Article 5(3)(a) of the Designation Order the persons appointed may discharge the relevant functions as if they were the governing body of the Financial Conduct Authority.
- C. By virtue of Article 7(1) of the Designation Order this Instrument shall be treated as if it had been made by the Financial Conduct Authority acting through its governing body.
- D. Article 2(1)(c) of the Early Commencement Order commenced certain of the Financial Conduct Authority's rule making and other powers for the purposes specified in Part 3 of the Schedule to that Order.

**Interpretation**

- 1. In this Instrument (including the Recitals):
  - (1) "Designation Order" means the Financial Services Act 2012 (Transitional Provisions) (Rules and Miscellaneous Provisions) Order 2013 (SI 2013/161);
  - (2) "Early Commencement Order" means the Financial Services Act 2012 (Commencement No. 1) Order 2013 (SI 2013/113);
  - (3) "the 2000 Act" means the Financial Services and Markets Act 2000;
  - (4) "the 2012 Act" means the Financial Services Act 2012;
  - (5) "the Authority" means the Financial Services Authority; and
  - (6) "Financial Conduct Authority" means the body corporate referred to in section 1A of the 2000 Act as amended by section 6 of the 2012 Act.

**Rules etc. made, given or amended by the Financial Conduct Authority**

- 2. In accordance with Article 2(1) of the Early Commencement Order and in the exercise of the powers and related provisions specified in paragraph 3, the Financial Conduct Authority makes, amends, issues, gives, or imposes each provision in Annex A to D to this Instrument.

The modules of the FCA's Handbook of rules and guidance listed in column (1) below are amended in accordance with the Annexes to this Instrument listed in column (2).

(1)	(2)
Glossary of definitions	Annex A
Supervision manual (SUP)	Annex B
Decision Procedure and Penalties manual (DEPP)	Annex C

The Enforcement Guide (EG) is amended in accordance with Annex D to this Instrument.

3. The Financial Conduct Authority makes, amends, issues, gives or imposes the provisions in the Annexes to this Instrument in exercise of the following powers and related provisions of the 2000 Act, as amended by the 2012 Act:
  - (1) Section 137T (General supplementary powers);
  - (2) Section 139A (Power of the FCA to give guidance); and
  - (3) Section 210 (Statements of policy)
4. The rule-making powers in paragraph 3 are specified for the purpose of section 138G (Rule-making instruments) of the 2000 Act, as amended by the 2012 Act.

**Commencement: Financial Conduct Authority**

5. The Financial Conduct Authority directs that paragraph 2 of this Instrument comes into force on 1 April 2013.

**Citation**

6. This Instrument may be cited as the Over-the-Counter Derivatives, Central Counterparties and Trade Repositories Instrument 2013.

**By order of the persons appointed under Article 5 of the Designation Order to discharge specified functions of the Financial Conduct Authority as if they were its governing body**

19 March 2013

**Annex A****Amendments to the Glossary of definitions**

Insert the following new definitions in the appropriate alphabetical position. The text is not underlined.

*EMIR requirements* requirements imposed under *EMIR* and any regulation made under it.

[FCA]

*non-authorised counterparty* in relation to *EMIR*, either:

[FCA]

(a) a financial counterparty which is not an *authorised person*; or

(b) a non-financial counterparty.

*OTC derivatives, CCPs and trade repositories regulation* the Financial Services and Markets Act 2000 (Over the Counter Derivatives, Central Counterparties and Trade Repositories) Regulations 2013.

[FCA]

## Annex B

### Amendments to the Supervision manual (SUP)

After SUP 15 insert the following new chapter. The text is not underlined.

#### **15A      Application and notifications under EMIR**

##### **15A.1    Applications and notifications under EMIR**

- 15A.1.1    G    Where a *person* intends to rely on article 4(2), 10(2) or 89(2) of *EMIR* for an exemption from the clearing obligation set out in article 4(1) or 10(1) of *EMIR*, the *person* should make their application or notification to the *FCA* in such manner, and by providing such information, as the *FCA* directs or requires.
- [FCA]
- 15A.1.2    G    Where a *person* makes a notification in respect of the obligation set out in article 10(1)(a) of *EMIR*, the *person* should make the notification to the *FCA* in such manner, and by providing such information, as the *FCA* directs or requires.
- [FCA]
- 15A.1.3    G    Where a *person* intends to rely on article 11(6), (7), (8), 9) or (10) for an exemption from the obligation to implement risk management procedures set out in article 11(3) of *EMIR*, the *person* should make their application or notification to the *FCA* in accordance with *EMIR requirements*.
- [FCA]
- 15A.1.4    G    The *FCA* may require any information referred to in SUP 15A.1 to 15A.3 above to be provided in such form, or to be verified in such as a way, as the *FCA* may reasonably direct.
- [FCA]
- 15A.1.5    G    At any time after receiving an application or notification for exemption from, or a notification in respect of, *EMIR requirements*, the *FCA* may require the *person* concerned to provide it with such further information as it reasonably considers necessary to enable it to determine the application or consider the notification.
- [FCA]

## Annex C

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

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

## Schedule 3 Fees and other required payments

...

3.2 G

The ~~FSA's~~ FCA's power to impose financial penalties is contained in:

[FCA]

...

the *Cross-Border Payments in Euro Regulations*

the *OTC derivatives, CCPs and trade repositories regulation*

## Annex D

### Amendments to the Enforcement Guide (EG)

After EG 19.120 insert the following new paragraphs. The text is not underlined.

#### **OTC Derivatives, Central Counterparties and Trade Repositories Regulations 2013**

19.121      The *OTC derivatives, CCPs and trade repositories regulation* sets out  
[FCA]      information gathering and sanctioning powers enabling the *FCA* to investigate  
and take action for breaches of *EMIR requirements*.

#### ***Information gathering powers***

19.122      The *FCA* may require a *non-authorised counterparty* that is subject to  
[FCA]      obligations under *EMIR* to provide specified information or specified documents  
so that it can verify whether the *non-authorised counterparty* has complied with  
*EMIR*. The *FCA* also has the power to require a *person* to provide specified  
information or specified documents so that it can verify whether the *person* is  
subject to *EMIR*. The *FCA* may require the above information to be provided in  
such form, or to be verified or authenticated in such manner, as is reasonably  
required in connection with the exercise of the *FCA*'s functions under *EMIR*.

#### ***Sanctioning powers***

19.123      (1)      The *FCA* has the power to impose a financial penalty of such amount as it  
[FCA]      considers appropriate on a financial counterparty, non-financial  
counterparty or other *person* who has contravened an *EMIR requirement*  
or regulation 7 or 8 of the *OTC derivatives, CCPs and trade repositories*  
*regulation*. The power to impose a financial penalty does not extend to  
contravention of articles 11(3) and (4) of *EMIR* by PRA-authorised  
financial counterparties.

(2)      Where the *FCA* has imposed such a penalty, it must publish a statement to  
that effect unless such disclosure would seriously jeopardise the financial  
markets or cause disproportionate damage to the parties involved.

19.124      As the power to impose penalties for contravention of an *EMIR* requirement or  
[FCA]      regulations 7 or 8 of the *OTC derivatives, CCPs and trade repositories*  
*regulation* mirrors similar powers to that the *FCA* has under the *Act*, the *FCA*  
will adopt procedures and policies in relation to the use of those powers akin to  
those it has adopted under the *Act*.

19.125      The *FCA* will use the sanctioning powers where it is appropriate to do so and  
[FCA]      with regard to the relevant factors listed in *DEPP* 6.2.1G. In determining the  
appropriate level of financial penalty, the *FCA* will have regard to the principles  
set out in *DEPP* 6.5, *DEPP* 6.5A, *DEPP* 6.5B, *DEPP* 6.5D and *DEPP* 6.7.

19.126      Where the *FCA* proposes or decides to take action to impose a financial penalty  
referred to in *EG* 19.122G, it will give the *person* concerned a *warning notice* or

- [FCA] a *decision notice* respectively. Those notices must state the amount of the penalty. On receiving a *warning notice*, the *person* concerned has a right to make representations regarding the *FCA*'s proposed decision. A *person* that receives a *decision notice* may refer the matter to the *Tribunal*.
- 19.127 [FCA] If it is proposing to impose a penalty under the *OTC derivatives, CCPs and trade repositories regulation*, the *FCA*'s decision maker will be the *RDC*. The *RDC* will make its decisions following the procedure set out in *DEPP* 3.2 or where appropriate, *DEPP* 3.3.
- 19.128 [FCA] Sections 393 and 394 of the *Act* apply to notices referred to in this section. See *DEPP* 2.4 (Third party rights and access to *FCA* material).
- 19.129 [FCA] The *FCA* will apply the approach to publicity that is outlined in *EG* 6.
- 19.130 [FCA] In relation to *authorised persons* and *recognised bodies* which are subject to obligations under *EMIR*, other information gathering powers and sanctions may also be applicable under the *Act*.