

**REFERRAL FEES REGULATIONS (ENFORCEMENT GUIDANCE) INSTRUMENT
2013**

Powers exercised by the Financial Conduct Authority

- A. The Financial Conduct Authority makes this instrument in the exercise of:
- (1) the following powers and related provisions of the Financial Services and Markets Act 2000 (“the Act”):
 - (a) section 69 (Statements of policy) as applied by regulation 29(1) of the Legal Aid, Sentencing and Punishment of Offenders Act 2012 (Referral Fees) Regulations 2013 (SI 2013/1635) (“the Regulations”);
 - (b) section 210 (Statements of policy) as applied by regulation 29(2) of the Regulations; and
 - (c) section 395 (The FCA’s and PRA’s procedures) as applied by regulation 30(7) of the Regulations;
 - (2) the powers in regulation 5 (Guidance) of the Regulations; and
 - (3) the other guidance making powers listed in Schedule 4 (Powers exercised) to the General Provisions of the FCA’s Handbook.

Commencement

- B. This instrument comes into force on 8 November 2013.

Amendments to the Handbook

- C. The Glossary of definitions 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 material outside the Handbook

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

Citation

- F. This instrument may be cited as Referral Fees Regulations (Enforcement Guidance) Instrument 2013.

By order of the Board of the Financial Conduct Authority
7 November 2013

Annex A

Amendments to the Glossary of definitions

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

Referral Fees Regulations the Legal Aid, Sentencing and Punishment of Offenders Act 2012
(Referral Fees) Regulations 2013 (SI 2013/1635).

Annex B

Amendments to the Decision Procedure and Penalties manual (DEPP)

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

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

...

Alternative Investment Fund Managers Regulations 2013	Description	Handbook reference	Decision maker
...			

<u>Legal Aid, Sentencing and Punishment of Offenders Act 2012 (Referral Fees) Regulations 2013</u>	<u>Description</u>	<u>Handbook reference</u>	<u>Decision maker</u>
<u>Regulation 24(1) and 24(6)</u>	<u>when the FCA is proposing or deciding to exercise its powers to require restitution*</u>		<u>RDC</u>
<u>Regulation 25(1) and 26(1)</u>	<u>when the FCA is proposing or deciding to publish a statement (under regulations 14 or 15) or impose a financial penalty (under regulation 16) or impose a restriction on permission (under regulation 17) or suspend or restrict an approval (under regulation 18)*</u>		<u>RDC</u>

...

Sch 3 Fees and other required payments

...

Sch
3.2G

The <i>FCA</i> 's power to impose financial penalties is contained in:	
	...
	the <i>AIFMD UK regulation</i>
	<u>the <i>Referral Fees Regulations</i></u>

Sch 4 Powers Exercised

...

Sch
4.2G

The following additional powers and related provisions have been exercised by the <i>FCA</i> to make the statements of policy in <i>DEPP</i> :	
	...
	Regulation 71 (Application of Act to <i>unauthorised AIFs</i> <u><i>unauthorised AIFs</i></u>) of the <i>AIFMD UK regulation</i>
	<u>Regulation 29 (Statements of policy) of the <i>Referral Fees Regulations</i></u>
	<u>Regulation 30 (Application of Part 26 of the 2000 Act) of the <i>Referral Fees Regulations</i></u>

Annex C

Amendments to the Enforcement Guide (EG)

All the text in this Annex is new and is not underlined.

Insert the following new provisions after EG 19.142.

Legal Aid, Sentencing and Punishment of Offenders Act 2012 (Referral Fees) Regulations 2013

- 19.143 The *Referral Fees Regulations* give the *FCA* investigation and sanctioning powers in relation to the contravention of the rules against referral fees contained in sections 56 to 60 of the Legal Aid, Sentencing and Punishment of Offenders Act 2012 (the LASPO Act), as well as the contravention of requirements imposed by, or under, the *Referral Fees Regulations*.
- 19.144 The *FCA's* approach to taking enforcement action under the *Referral Fees Regulations* will mirror its general approach to enforcing the *Act*, as set out in EG 2. It will seek to exercise its enforcement powers in a manner that is transparent, proportionate and responsive to the issue and consistent with its publicly stated policies. It will also seek to ensure fair treatment when exercising its enforcement powers. Finally, it will aim to change the behaviour of the person who is the subject of its action, to deter future non-compliance by others, to eliminate any financial gain or benefit from non-compliance and, where appropriate, to remedy the harm caused by the non-compliance.
- 19.145 The *Referral Fees Regulations*, for the most part, mirror the *FCA's* investigative and sanctioning powers under the *Act*. The *FCA* has adopted procedures and policies for the use of those powers that are akin to those it has under the *Act*. Key features of the *FCA's* approach are described below.

Information gathering and investigation powers

- 19.146 The *Referral Fees Regulations* apply much of Part 11 of the *Act*. The effect of this is to apply the same procedures under the *Act* for appointing investigators and requiring information when investigating contraventions of the relevant provisions of the LASPO Act or the *Referral Fees Regulations*.
- 19.147 The *FCA* will notify the subject of the investigation that it has appointed investigators to carry out an investigation under the *Referral Fees Regulations* and the reasons for the appointment, unless notification is likely to result in the investigation being frustrated. In most cases, the *FCA* expects to carry out a scoping visit early on in the enforcement process. The *FCA's* policy in civil investigations under the *Referral Fees Regulations* is to use powers to compel information, in the same way as it would in the course of an investigation under the *Act*.

Decision making under the Referral Fees Regulations

- 19.148 The *RDC* is the *FCA*'s decision maker for decisions which require *warning notices* or *decision notices* to be given under the *Referral Fees Regulations*, as set out in *DEPP 2 Annex 1G*. The *RDC* will make its decisions following the procedure set out in *DEPP 3.2* or, where appropriate, *DEPP 3.3*.
- 19.149 The *Referral Fees Regulations* do not require the *FCA* to publish procedures to commence criminal prosecutions. However, the *FCA* will normally follow its equivalent decision-making procedures for similar decisions under the *Act*, as set out in *EG 12*.
- 19.150 The *Referral Fees Regulations* do not require the *FCA* to publish procedures to apply to the court for an injunction or restitution order. However, the *FCA* will normally follow its equivalent decision-making procedures for similar decisions under the *Act*, as set out in *EG 10* and *EG 11*.
- 19.151 The *Referral Fees Regulations* apply sections 393 and 394 of the *Act* to *warning notices* and *decision notices* given under the *Referral Fees Regulations* and so require the *FCA* to give third party rights and to give access to material.
- 19.152 The *Referral Fees Regulations* apply the procedural provisions of Part 9 of the *Act*, as modified by the *Referral Fees Regulations*, in respect of matters that can be referred to the *Tribunal*. Referral to the *Tribunal* in respect of *decision notices* given under regulation 26(1) of the *Referral Fees Regulations* are treated as disciplinary referrals for the purpose of section 133 of the *Act*.

Public censures, imposition of penalties and the impositions of suspensions or restrictions under the Referral Fees Regulations

- 19.153 When determining whether to take action to impose a penalty or to issue a public censure under the *Referral Fees Regulations*, the *FCA*'s policy includes having regard to the relevant factors in *DEPP 6.2* and *DEPP 6.4*. When determining the level of financial penalty, the *FCA*'s policy includes having regard to the relevant principles and factors in *DEPP 6.5* to *DEPP 6.5B*, *DEPP 6.5D* and *DEPP 6.7*.
- 19.154 As with cases under the *Act*, the *FCA* may settle or mediate appropriate cases involving civil breaches of the *Referral Fees Regulations* to assist it to exercise its functions. *DEPP 5*, *DEPP 6.7* and *EG 5* set out information on the *FCA*'s settlement process and the settlement discount scheme.
- 19.155 When determining whether to take action to impose a suspension or restriction under the *Referral Fees Regulations*, the *FCA*'s policy includes having regard to the relevant factors in *DEPP 6A.2* and *6A.4*. When determining the length of the period of suspension or restriction, the *FCA*'s policy includes having regard to the relevant principles and factors in *DEPP 6A.3*. However, the *FCA* does not have the power to suspend an *authorised person's permission* under the *Referral Fees Regulations*.
- 19.156 The *FCA* will apply the approach to publicity that is outlined in *EG 6*.