

**OVER-THE-COUNTER DERIVATIVES, CENTRAL COUNTERPARTIES AND
TRADE REPOSITORIES (NO 2) INSTRUMENT 2014**

Powers exercised

- A. The Financial Conduct Authority makes this instrument in the exercise of the following powers and related provisions in the Financial Services and Markets Act 2000 (“the Act”):
- (1) section 137T (General supplementary powers);
 - (2) section 139A (Power of the FCA to give guidance);
 - (3) section 205 (Public censure);
 - (4) section 206 (Financial penalties);
 - (5) section 387 (Warning notices);
 - (6) section 388 (Decision notices);
 - (7) section 210 (Statements of policy); and
 - (8) section 391 (Publication).
- B. The rule-making powers listed above are specified for the purpose of section 138G(2) (Rule-making instruments) of the Act.

Commencement

- C. This instrument comes into force on 31 January 2014.

Amendments to the FCA Handbook

- D. The Glossary of definitions is amended in accordance with Annex A to this instrument.
- E. The Supervision manual (SUP) is amended in accordance with Annex B to this instrument.

Material outside the Handbook

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

Notes

- G. In Annex C to this instrument, the “notes” (indicated by “**Note:**”) are included for the convenience of readers but do not form part of the legislative text.

Citation

- H. This instrument may be cited as the Over-the-Counter Derivatives, Central Counterparties and Trade Repositories (No 2) Instrument 2014.

By order of the Board of the Financial Conduct Authority
30 January 2014

Annex A

Amendments to the Glossary of definitions

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

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

EMIR technical standards on OTC derivatives means “Commission Delegated Regulation (EU) 149/2013 of 19 December 2012 supplementing *EMIR* with regard to regulatory technical standards on indirect clearing arrangements, the clearing obligation, the public register, access to a trading venue, non-financial counterparties, and risk mitigation techniques for OTC derivatives contracts not cleared by a central counterparty”.

Amend the following definition as shown.

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

- (a) a financial counterparty which is not an *authorised person*; or
- (b) a non-financial counterparty; or
- (c) a third country entity referred to in article 4(1)(a)(v) of *EMIR*.

Annex B

Amendments to the Supervision manual (SUP)

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

15A.1 Application and notifications under EMIR

...

- 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, including (where relevant) those set out in the EMIR technical standards on OTC derivatives.*
- 15A.1.3A G Where a *person* is required to make a notification to the *FCA* in accordance with article 12(4) or article 15(2) of the *EMIR technical standards on OTC derivatives*, that notification should be made in accordance with the *EMIR requirements set out in the EMIR technical standards on OTC derivatives.*
- 15A.1.4 G The *FCA* may require any information referred to in *SUP* 15A.1.1G to ~~*SUP* 15A.1.3G~~ *SUP* 15A.1.3AG above to be provided in such form, or to be verified in such as a way, as the *FCA* may reasonably direct.

Annex C

Amendments to the Enforcement Guide (EG)

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

OTC Derivatives, Central Counterparties and Trade Repositories Regulations 2013

- 19.121 The FCA has information gathering and sanctioning powers under the Act which are applicable to breaches of EMIR requirements by authorised persons or recognised bodies. ~~The OTC derivatives, CCPs and trade repositories regulation adds to the powers available to the FCA for dealing with breaches of EMIR requirements and sets out information gathering and sanctioning powers enabling the FCA to investigate and take action for breaches of the EMIR requirements by non-authorised counterparties and for certain breaches of the OTC derivatives, CCPs and trade repositories regulation by authorised persons.~~ Such powers under the OTC derivatives, CCPs and trade repositories regulation or the Act do not extend to breaches of article 11(3) and (4) of EMIR by PRA-
authorised financial counterparties.

...

Sanctioning powers

- 19.123 (1) The FCA has the power to publish a statement or impose a financial penalty of such amount as it considers appropriate on a financial counterparty, a 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:~~
- (a) a financial counterparty who is not an authorised person, a non-financial counterparty or any other person who has breached an EMIR requirement or regulation 7 or 8 of the OTC derivatives, CCPs and trade repositories regulation;
- (b) a financial counterparty who is an authorised person who has breached regulation 8 of the OTC derivatives, CCPs and trade repositories regulation.
- (2) ~~Where the FCA has imposed such~~ Where the FCA exercises its power to impose a financial penalty under the OTC derivatives, CCPs and trade repositories regulation or the Act for breaches in relation to EMIR, 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.

[Note: article 12(2) of EMIR and regulation 9(3) of the OTC derivatives, CCPs and trade repositories regulation]

- 19.124 As the power to impose penalties for contravention of an ~~EMIR requirement~~ EMIR requirement or 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*, subject to EG 19.123G(2).
- 19.125 The *FCA* will use the sanctioning powers where it is appropriate to do so and with regard to the relevant factors listed in *DEPP* 6.2.1G and *DEPP* 6.4. 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 publish a statement or impose a financial penalty referred to in EG 19.122G 19.123G, it will give the *person* concerned a *warning notice* or a *decision notice* respectively. ~~Those notices must~~ In the case of a public statement, the *warning notice* or *decision notice* will also set out the terms of the statement. In the case of a financial penalty, the *warning notice* or *decision notice* will also 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 If it is proposing to publish a statement or 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.
- ...
- 19.129 ~~The~~ In relation to the notices in this section, the *FCA* will, subject to EG 19.123G(2), apply the approach to publicity that is outlined in *EG* 6.