

**INDIVIDUAL ACCOUNTABILITY (ENFORCEMENT) (DUTY OF
RESPONSIBILITY) INSTRUMENT 2017**

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 69 (Statement of policy);
 - (2) section 139A (Power of the FCA to give guidance); and
 - (3) section 210(1) (Statements of policy).

Commencement

- B. This instrument comes into force on 3 May 2017.

Amendments to the Handbook

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

Citation

- D. This instrument may be cited as the Individual Accountability (Enforcement) (Duty of Responsibility) Instrument 2017.

By order of the Board
27 April 2017

Annex

Amendments to the Decision Procedure and Penalties manual (DEPP)

In this Annex, underlining indicates new text.

6 Penalties

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6.2 Deciding whether to take action

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Action against individuals under section 66 of the Act

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6.2.6A G DEPP 6.2.6BG to DEPP 6.2.9G apply to action taken by the FCA under section 66 of the Act, except for action taken by virtue of section 66A(5). DEPP 6.2.9-AG to DEPP 6.2.9-FG apply only to action taken by virtue of section 66A(5).

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6.2.9 G ...

Action against an SMF manager under section 66A(5) of the Act

6.2.9-A G The FCA is able to take action against an SMF manager under section 66A(5) of the Act where:

- (1) there has been (or continues to be) a contravention of a relevant requirement by the SMF manager's firm;
- (2) at the time of the contravention, the SMF manager was responsible for the management of any of the firm's activities in relation to which the contravention occurred; and
- (3) the SMF manager did not take such steps as a person in their position could reasonably be expected to take to avoid the contravention by the firm occurring (or continuing).

In such an action, an SMF manager is not bound by a finding of the RDC, a court or a tribunal, which he or she was not privy nor party to.

6.2.9-B G When deciding whether to take action further to section 66A(5) of the Act, the FCA will follow the approach in DEPP 6.2.1G and DEPP 6.2.6G.

6.2.9-C G When determining, for the purposes of section 66A(5) of the Act, whether an SMF manager was responsible for the management of any of the firm's

activities in relation to which a contravention of a relevant requirement by the firm occurred, the FCA will consider the full circumstances of each case. A list of considerations that may be relevant for this purpose is set out below. This list is not exhaustive.

- (1) The SMF manager's statement of responsibilities, including whether the SMF manager was performing an executive or non-executive role.
- (2) The firm's management responsibilities map.
- (3) How the firm operated, and how responsibilities were allocated in the firm in practice.
- (4) The SMF manager's actual role and responsibilities in the firm, to be determined by reference to, among other things, minutes of meetings, emails, regulatory interviews, telephone recordings and organisational charts.
- (5) The relationship between the SMF manager's responsibilities and the responsibilities of other SMF managers in the firm (including any joint responsibilities or matrix management structures).

6.2.9-D G Under section 66A(5)(d) of the Act, such steps as a person in the position of the SMF manager could reasonably be expected to take to avoid the firm's contravention of a relevant requirement occurring (or continuing) are:

- (1) such steps as a competent SMF manager would have taken:
 - (a) at that time;
 - (b) in that specific individual's position;
 - (c) with that individual's role and responsibilities; and
 - (d) in all the circumstances.

6.2.9-E G When determining under section 66A(5)(d) of the Act whether or not an SMF manager has taken such steps as a person in their position could reasonably be expected to take to avoid the contravention of a relevant requirement by the firm occurring (or continuing), additional considerations to which the FCA would expect to have regard include, but are not limited to:

- (1) the role and responsibilities of the SMF manager (for example, such steps as an SMF manager in a non-executive role could reasonably be expected to take may differ, depending on the circumstances, from those reasonably expected of an SMF manager in an executive role: see, for example, the guidance on the role and responsibilities of non-executive directors for relevant authorised persons in COCON 1 Annex 1G);

- (2) whether the *SMF manager* exercised reasonable care when considering the information available to them;
- (3) whether the *SMF manager* reached a reasonable conclusion on which to act;
- (4) the nature, scale and complexity of the *firm's* business;
- (5) the knowledge the *SMF manager* had, or should have had, of regulatory concerns, if any, relating to their role and responsibilities;
- (6) whether the *SMF manager* (where they were aware of, or should have been aware of, actual or suspected issues that involved possible breaches by their *firm* of relevant requirements relating to their role and responsibilities) took reasonable steps to ensure that the issues were dealt with in a timely and appropriate manner;
- (7) whether the *SMF manager* acted in accordance with their statutory, common law and other legal obligations, including, but not limited to, those set out in the Companies Act 2006, the *Handbook* (including *COCON*), and, if the *firm* was listed on the *London Stock Exchange*, the *UK Corporate Governance Code* and related guidance;
- (8) whether the *SMF manager* took reasonable steps to ensure that any delegation of their responsibilities, where this was itself reasonable, was to an appropriate person with the necessary capacity, competence, knowledge, seniority and skill, and whether the *SMF manager* took reasonable steps to oversee the discharge of the delegated responsibility effectively;
- (9) whether the *SMF manager* took reasonable steps to ensure that the reporting lines, whether in the *UK* or *overseas*, in relation to the *firm's* activities for which they were responsible, were clear to staff and operated effectively;
- (10) whether the *SMF manager* took reasonable steps to satisfy themselves, on reasonable grounds, that, for the activities for which they were responsible, the *firm* had appropriate policies and procedures for reviewing the competence, knowledge, skills and performance of each individual member of staff to assess their suitability to fulfil their duties;
- (11) whether the *SMF manager* took reasonable steps (including in relation to *SYSC* 4.9) to assess, on taking up each of their responsibilities, and monitor, where reasonable, the governance, operational and risk management arrangements in place for the *firm's* activities for which they were responsible (including, where appropriate, corroborating, challenging and considering the wider implications of the information available to them), and whether they took reasonable steps to deal with any actual or suspected issues identified as a result in a timely

and appropriate manner;

- (12) whether the *SMF manager* took reasonable steps to ensure an orderly transition when another *SMF manager* under their oversight or responsibility was replaced in the performance of that function by someone else;
- (13) whether the *SMF manager* took reasonable steps to ensure an orderly transition when they were replaced in the performance of their function by someone else;
- (14) whether the *SMF manager* failed to take reasonable steps to understand and inform themselves about the *firm's* activities for which they were responsible, including, but not limited to, whether they:
- (a) failed to ensure adequate reporting or seek an adequate explanation of issues within a business area, whether from people within that business area, or elsewhere within or outside the *firm*, if they were not an expert in that area; or
 - (b) failed to maintain an appropriate level of understanding about an issue or a responsibility that they delegated to an individual or individuals; or
 - (c) failed to obtain independent, expert opinion where appropriate from within or outside the *firm* as appropriate; or
 - (d) permitted the expansion or restructuring of the business without reasonably assessing the potential risks; or
 - (e) inadequately monitored highly profitable *transactions*, business practices, unusual *transactions*, or individuals who contributed significantly to the profitability of a business area or who had significant influence over the operation of a business area;
- (15) whether the *SMF manager* took reasonable steps to ensure that, where they were involved in a collective decision affecting the *firm's* activities for which they were responsible, and it was reasonable for the decision to be taken collectively, they informed themselves of the relevant matters before taking part in the decision, and exercised reasonable care, skill and diligence in contributing to it;
- (16) whether the *SMF manager* took reasonable steps to follow the *firm's* procedures, where this was itself appropriate;
- (17) how long the *SMF manager* had been in role with their responsibilities and whether there was an orderly transition and handover when they took up the role and responsibilities;
- (18) whether the *SMF manager* took reasonable steps to implement (either personally or through a compliance department or other departments)

adequate and appropriate systems and controls to comply with the relevant requirements and standards of the regulatory system for the activities of the firm.

6.2.9-F G Where action is taken against an *SMF manager* under section 66A(5) of the Act the onus will be on the *FCA* to show that the *SMF manager* has been guilty of misconduct.

Action under section 63A of the Act against persons that perform a controlled function without approval

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