

**DECISION PROCEDURE AND PENALTIES MANUAL AND ENFORCEMENT  
GUIDE (REVIEW) 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 63C (Statement of policy);
  - (2) section 69 (Statement of policy);
  - (3) section 88C (Action under section 88A: statement of policy);
  - (4) section 89S (Action under section 89Q: statement of policy);
  - (5) section 93 (Statement of policy);
  - (6) section 124 (Statement of policy);
  - (7) section 131J (Imposition of penalties under section 131G: statement of policy);
  - (8) section 137T (General supplementary powers);
  - (9) section 139A (Power of the FCA to give guidance);
  - (10) section 192N (Imposition of penalties under section 192K: statement of policy);
  - (11) section 210 (Statements of policy);
  - (12) section 312J (Statement of policy);
  - (13) section 345D (Imposition of penalties on auditors or actuaries: statement of policy);  
and
  - (14) section 395 (The FCA’s and PRA’s procedures).
- 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 as follows:
- (1) Part 1 of Annex B (DEPP) and Part 1 of Annex C (EG) come into force on 31 January 2017; and
  - (2) the remainder of this instrument comes into force on 1 March 2017.

**Amendments to the Handbook**

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

**Amendments to material outside the Handbook**

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

**Notes**

G. In the Annex 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**

G. This instrument may be cited as the Decision Procedure and Penalties Manual and Enforcement Guide (Review) Instrument 2017.

By order of the Board  
25 January 2017

## 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.

<i>focused resolution agreement</i>	(in <i>DEPP</i> ) a <i>settlement agreement</i> that:
	(1) concerns proposed enforcement action that requires the <i>FCA</i> to issue a <i>warning notice</i> ; and
	(2) sets out an agreed position on one or more, but not all, of the issues relevant to a proposed enforcement action.

Amend the following definitions as shown.

<i>settlement agreement</i>	(1) (in <i>SYSC</i> 18) (Whistleblowing) an agreement between the <i>firm</i> and a <i>worker</i> which sets out the terms and conditions agreed by these parties for the purposes of settling a potential employment tribunal claim, other court proceedings or employment disputes.
	(2) <u>(in <i>DEPP</i>) an agreement reached between a <i>person</i> who is or may be subject to enforcement action and <i>FCA</i> staff as part of the <i>settlement decision procedure</i>.</u>
<i>settlement discount scheme</i>	(in <i>DEPP</i> and <i>EG</i> ) the scheme described in <i>DEPP</i> 6.7 by which the financial penalty that might otherwise be payable, or the length of the period of suspension or restriction that might otherwise be imposed, in respect of a <i>person's</i> misconduct or contravention may be reduced to reflect the timing of any <del>settlement agreement</del> <u><i>settlement agreement</i></u> .

## 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.

#### Part 1: Comes into force on 31 January 2017

### 3 The nature and procedure of the RDC

...

#### 3.2 The operation of the RDC

RDC meetings and composition of panels

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- 3.2.3 G The composition and size of panels of the *RDC* may vary depending on the nature of the particular matter under consideration. ~~In cases in which representations are made, it~~ It will be usual for the panel that is to consider the representations and decide whether to give a *decision notice* to ~~include additional~~ comprise the same members of the *RDC* who ~~have not~~ previously considered the matter. In particularly complex cases, or those raising novel points of law or practice, it might be appropriate for a larger panel to consider the case at both the warning notice and representations stage, and there may still be cases where it is appropriate that the panel is enlarged to include additional RDC members at the decision notice stage.

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Procedure: representations

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- 3.2.16 G (1) The recipient of a *warning notice* or a first *supervisory notice* may request an extension of the time allowed for making representations. Such a request must normally be made within ~~sevendays~~ seven days of the notice being given.
- (2) If a request is made, the Chairman or a Deputy Chairman of the *RDC* will decide whether to allow an extension, and, if so, how much additional time is to be allowed for making representations. In reaching his ~~his~~ their decision he ~~they~~ will take into account all relevant factors including the legal and factual complexity of the case, as well as whether there are any factors outside the control of the *firm* or *individual* that would materially

impact on their ability to respond within the period set out in the *warning notice* or first supervisory notice. They may also take account of any relevant comments from the *FCA* staff responsible for the matter.

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- 3.2.18 G The chairman of the relevant meeting will ensure that the meeting is conducted so as to enable:

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but the chairman may ask the recipient of the notice or *FCA* staff to limit their representations or response in length or to particular issues arising from the *warning notice* or first *supervisory notice*. If the *warning notice* was given on the basis of a *focused resolution agreement*, the recipient will be required to limit their representations to the issues that remain in dispute.

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Procedure: decision notices and second supervisory notices

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- 3.2.22A G If the *person* subject to enforcement action notifies the *RDC* that they wish to make an expedited reference to the *Tribunal* under *DEPP* 5.1.8GG, the *RDC* shall decide whether to give a *decision notice* in the light of any representations by any third party under section 393 of the *Act* and any other *interested party* under section 63 or 67 of the *Act* (see *DEPP* 5.1.8IG).

- 3.2.23 G ~~However, if representations are made,~~ In any case in which representations are made, and in accordance with *DEPP* 2.3.1G<sub>2</sub>, the *RDC* will consider whether it is right in all the circumstances to give the *decision notice* or a second *supervisory notice* (as appropriate).

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## **Part 2: Comes into force on 1 March 2017**

Amend the following as shown.

### **1.1 Application and Purpose**

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

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- (1B) the *FCA's* decision-making procedure where it is deciding under section 391(1)(c) of the *Act* to publish information about the matter to which a *warning notice* relates (see *DEPP 3.2.14AG* to *DEPP 3.2.14HG* and *DEPP 5.1.8KG* to *DEPP 5.1.8QG*);

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### 3 The nature and procedure of the RDC

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#### 3.2 The operation of the RDC

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Procedure: general

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- 3.2.11A G Where a *warning notice* is given on the basis of a *focused resolution agreement*, the *RDC* shall accept and not in any circumstances depart from the agreed position on the issues set out in that agreement.

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- 3.2.14A G If *FCA* staff consider that it is appropriate to publish information about the matter to which a *warning notice* falling within section 391(1ZB) of the *Act* and given by the *RDC* relates, they will make a recommendation to the *RDC* that such information should be published.

- 3.2.14B G The *RDC* will then consider whether it is appropriate in all the circumstances to publish information about the matter to which a the *warning notice* falling within section 391(1ZB) of the *Act* relates. The *FCA's* policy on publishing such information is set out in *EG 6*.

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### 5 Settlement decision procedure

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#### 5.1 Settlement decision makers

Introduction

- 5.1.1 G (1) A *person* subject to enforcement action may agree to a financial penalty or other outcome rather than contest formal action by the *FCA*. Alternatively, they may enter into a *focused resolution agreement* and in this way partly contest the proposed action (see *DEPP 5.1.8AG* to *DEPP 5.1.8DG*).
- (1A) Further, even if the *person* subject to enforcement action wishes to fully contest the proposed enforcement action, they may choose to do so by (i) agreeing to the *FCA* issuing the required *statutory notices* and (ii) then making an expedited reference of the matter to the *Tribunal* (see *DEPP 5.1.8EG* to *DEPP 5.1.8JG*).
- (2) The fact that ~~he~~ a *person* does so ~~any of these things~~ will not usually obviate the need for a ~~statutory notice~~ *statutory notices* recording the *FCA*'s proposal and decision to take that action. Where, however, the *person* subject to enforcement action agrees not to contest the content of a proposed *statutory notice*, the decision to give that *statutory notice* will be taken by senior *FCA* staff. As set out in this chapter, senior *FCA* staff have a role to play in giving the requisite *statutory notices*:
- (a) where a *person* enters into a *settlement agreement* (other than a *focused resolution agreement*), senior *FCA* staff will give both the *warning notice* and *decision notice*;
- (b) where a *person* enters into a *focused resolution agreement*, senior *FCA* staff will give the *warning notice* and the *RDC* will decide whether to give a *decision notice* and the terms of any notice given; and
- (c) where a *person* elects to make an expedited reference to the *Tribunal* before a *warning notice* has been issued, senior *FCA* staff will then give the *warning notice* and *decision notice*.
- (3) These decisions by senior *FCA* staff will be taken jointly by two members of the *FCA*'s senior management, one of whom will be of at least director of division level (which may include an acting director) and the other of whom will be of at least head of department level (the "*settlement decision makers*").

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Insert the following new provisions after *DEPP 5.1.8G*. The text is not underlined.

5.1.8 G ...

## Procedure: focused resolution agreements

- 5.1.8A G The issues which may be agreed under a *focused resolution agreement* include, but are not limited to:
- (1) questions of fact;
  - (2) whether specified facts amount to a *breach* (or more than one *breach*);
  - (3) whether action for a financial penalty and/or *public censure* is warranted;
  - (4) the appropriate level of a financial penalty;
  - (5) whether action for a suspension, restriction, condition or limitation (as defined for the purposes of *DEPP 6A*) is warranted;
  - (6) the appropriate length of a suspension, restriction, condition or limitation (as defined for the purposes of *DEPP 6A*);
  - (7) whether a *prohibition order* is warranted; and/or
  - (8) the appropriate scope of such a *prohibition order*.
- 5.1.8B G The terms of any proposed *focused resolution agreement*:
- (1) will be put in writing and be agreed by *FCA* staff and the *person* concerned;
  - (2) may refer to a draft of the proposed *warning notice*; and
  - (3) may, depending upon the stage in the enforcement process at which agreement is reached, include an agreement by the *person* concerned to:
    - (a) waive and not exercise any rights under sections 387 (Warning notices) and 394 (Access to Authority material) of the *Act* to notice of, or access to, material relied upon by the *FCA* and any secondary material which might undermine the *FCA* decision to give the *statutory notice*, except in relation to material that is relevant to issues which remain in dispute; and
    - (b) not dispute the issues agreed with the *FCA* when:
      - (i) making representations to the *RDC* in respect of a *warning notice* (whether in exercise of rights under section 387 of the *Act* or otherwise); or
      - (ii) on any subsequent reference of the matter to the *Tribunal* under (except where the *Tribunal* decides of its own motion to reopen an issue or issues).



- 5.1.8C G Where the proposed settlement is on the basis of a *focused resolution agreement*, the role of the *settlement decision makers* shall be as follows:
- (1) The *settlement decision makers* will decide whether or not to give a *warning notice*. (For the avoidance of doubt, the *settlement decision makers* may meet the relevant *FCA* staff or the *person* concerned in accordance with *DEPP* 5.1.5G and any such meeting shall not affect the *settlement decision makers*' ability to decide whether or not to give a *warning notice*).
  - (2) If the *settlement decision makers* decline to give a *warning notice* based on the proposed *focused resolution agreement*, they may invite *FCA* staff and the *person* concerned to enter into further discussions to try to achieve an outcome the *settlement decision makers* would be prepared to endorse.
  - (3) If the *settlement decision makers* are satisfied with the proposed *focused resolution agreement*, they shall give a *warning notice* based on the proposed resolution agreement which records the agreed position on the agreed issues and the position of the *FCA* on those issues which remain in dispute.
  - (4) Where the *settlement decision makers* give a *warning notice*, the notice will specify the time allowed for making representations. This will not be less than 14 *days*.
  - (5) The *settlement decision makers* will promptly inform the *RDC* that a *warning notice* has been given. The *FCA* will then specify a time within which the *recipient* of the notice is required to indicate whether they wish to make oral representations.
  - (6) It will then be for the *RDC* to decide whether to give a *decision notice* under the procedure set out in *DEPP* 3.2.16G to *DEPP* 3.2.25G.
- 5.1.8D G For the avoidance of doubt, the decision whether to agree a proposed *focused resolution agreement* is entirely within the discretion of the *settlement decision makers*.

Procedure: expedited references to the Tribunal

- 5.1.8E G (1) The purpose of this section is to define a procedure (the “expedited reference procedure”) enabling a *person* subject to enforcement action to challenge the proposed action before the *Tribunal* without engaging with the *FCA*'s internal decision-making process.
- (2) *DEPP* 5.1.8FG to *DEPP* 5.1.8IG set out the circumstances in which the expedited reference procedure is available, the steps a *person* must take to make use of the procedure, and how the procedure operates, depending on whether it is invoked before or after the *warning notice* is given.

- 5.1.8F G The expedited reference procedure is available only if:
- (1) the proposed action requires the *FCA* to issue a *warning notice*;
  - (2) the *FCA* considers that it has a sufficient understanding of the nature and gravity of the *breach* to make a reasonable assessment of the appropriate penalty or other outcome; and
  - (3) the *FCA* has communicated that assessment to the *person* concerned.
- 5.1.8G G To use the expedited reference procedure, the *person* subject to enforcement action must notify the *FCA* that they:
- (1) wish to make an expedited reference to the Tribunal; and
  - (2) waive and will not exercise any rights under section 387(2) of the *Act* in respect of the *warning notice* given (or to be given) in relation to the proposed action.
- 5.1.8H G To use the expedited reference procedure before a *warning notice* has been given:
- (1) the notification set out in *DEPP* 5.1.8GG must be given to *FCA* staff;
  - (2) the decision to issue a *warning notice* will then be taken by the *settlement decision makers*; and
  - (3) the decision to issue a *decision notice* will also be taken by the *settlement decision makers*, taking into consideration any representations by any third party under section 393 of the *Act* or any *interested party* under section 63 or 67 of the *Act*.
- 5.1.8I G To use the expedited reference procedure after a *warning notice* has been given:
- (1) the notification set out in *DEPP* 5.1.8GG must be given to the *RDC*; and
  - (2) the decision to issue a *decision notice* will then be taken by the *RDC* in light of any representations by any third party under section 393 of the *Act* and any *interested party* under section 63 or 67 of the *Act*.
- 5.1.8J G Once a *decision notice* has been given as part of the expedited reference procedure (whether by the *settlement decision makers* or the *RDC*), it is the responsibility of the *person* subject to enforcement action to seek to refer the matter to the *Tribunal* under the *Act* if they so wish. If the matter is not referred to the *Tribunal* within the time required under section 390(1) of the *Act*, the *FCA* will, on taking the action to which the *decision notice* relates, give a *final notice*.

Procedure: warning notice statements

- 5.1.8K G If *FCA* staff consider that it is appropriate to publish information about the matter to which a *warning notice* falling within section 391(1ZB) of the *Act* relates and is given by the *settlement decision makers*, they will make a recommendation to the *settlement decision makers* that such information should be published.
- 5.1.8L G The *settlement decision makers* will then consider whether it is appropriate in all the circumstances to publish information about the matter to which the *warning notice* falling within section 391(1ZB) of the *Act* relates. The *FCA*'s policy on publishing such information is set out in *EG 6*.
- 5.1.8M G If the *settlement decision makers* propose that the *FCA* should publish information about the matter to which a *warning notice* falling within section 391(1ZB) of the *Act* relates:
- (1) the *settlement decision makers* will settle the wording of the statement it proposes the *FCA* should publish (warning notice statement);
  - (2) the *FCA* staff will make appropriate arrangements for the warning notice statement that the *settlement decisions makers* propose the *FCA* should publish to be given to the *persons* to whom the *warning notice* was given or copied;
  - (3) the proposed warning notice statement will specify the time allowed for the *recipient* to respond in writing to the *settlement decision makers*. This will normally be 14 days;
  - (4) the *recipient* of a proposed warning notice statement may request the *settlement decision makers* to grant an extension of the time allowed for its response. Such a request must normally be made within seven *days* of the proposed warning notice statement being given; and
  - (5) the *settlement decision makers* will not normally grant a request by a *person* to whom the warning notice statement was given to make their response in person.
- 5.1.8N G If no response to the proposed warning notice statement is received, the *FCA* will make appropriate arrangements to publish the warning notice statement.
- 5.1.8O G If the *settlement decision makers* receive a response from the *person* to whom the proposed warning notice statement was given, the *settlement decision makers* will consider their response and decide whether it is appropriate in all the circumstances to publish information about the matter to which the *warning notice* relates.
- 5.1.8P G If the *settlement decision makers* decide that the *FCA* should publish a warning notice statement:

- (1) the *settlement decision makers* will notify the relevant parties (including the relevant *FCA* staff) in writing of that decision;
- (2) the *settlement decision makers* will settle the wording of the warning notice statement; and
- (3) the *FCA* will make appropriate arrangements for the warning notice statement to be published.

5.1.8Q G If the *settlement decision makers* decide that the *FCA* should not publish a warning notice statement they will notify the relevant parties (including the relevant *FCA* staff) in writing of that decision.

Amend the following as shown.

## 6 Penalties

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### 6.7 Discount for early settlement

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The settlement discount scheme applied to ~~suspensions, restrictions, conditions, and disciplinary prohibitions~~ financial penalties

6.7.2 G In appropriate cases the *FCA's* approach will be to negotiate with the *person* concerned to agree in principle the amount of a financial penalty having regard to the *FCA's* statement of policy as set out in *DEPP* 6.5 to *DEPP* 6.5D and *DEPP* 6.6. (This starting figure will take no account of the existence of the *settlement discount scheme* described in this section.) Such amount ("A") will then be reduced by a percentage of A according to the ~~stage in the process at which agreement is reached~~ scheme set out in *DEPP* 6.7.3G to *DEPP* 6.7.3CG. The resulting figure ("B") will be the amount actually payable by the *person* concerned in respect of the *breach*. However, where part of a proposed financial penalty specifically equates to the disgorgement of profit accrued or loss avoided then the percentage reduction will not apply to that part of the penalty.

6.7.3 G (1) ~~The *FCA* has identified four stages of an action for these purposes:~~ Subject to *DEPP* 6.7.3G(4) a settlement discount is available only in cases where a *settlement agreement* (which may be a *focused resolution agreement*) is reached during the period from commencement of an investigation until the *FCA* has:

(a) ~~the period from commencement of an investigation until the *FCA* has:~~ a sufficient understanding of the nature and gravity of the *breach* to make a reasonable assessment of the appropriate

penalty; and

- (i) ~~a sufficient understanding of the nature and gravity of the breach to make a reasonable assessment of the appropriate penalty; and~~
  - (ii) ~~communicated that assessment to the person concerned and allowed a reasonable opportunity to reach agreement as to the amount of the penalty ("stage 1");~~
- (b) ~~the period from the end of stage 1 until the expiry of the period for making written representations or, if sooner, the date on which the written representations are sent in response to the giving of a *warning notice* ("stage 2"); communicated that assessment to the person concerned and given them reasonable opportunity to reach agreement as to the amount of the penalty ("stage 1").~~
- (c) ~~the period from the end of stage 2 until the giving of a *decision notice* ("stage 3");~~
- (d) ~~the period after the end of stage 3, including proceedings before the *Tribunal* and any subsequent appeals ("stage 4").~~
- (2) The communication of the *FCA's* assessment of the appropriate penalty for the purposes of *DEPP* 6.7.3G(1)(b)(a) need not be in a prescribed form but will include an indication of the *breaches* alleged by the *FCA*. It may include the provision of a draft *warning notice*.
- (3) ~~The reductions in penalty will be as follows:~~

<b>Stage at which agreement reached</b>	<b>Percentage reduction</b>
Stage 1	30
Stage 2	20
Stage 3	10
Stage 4	0

Subject to *DEPP* 6.7.3.G(4), in relation to any *settlement agreement* other than a *focused resolution agreement* the reduction in penalty will be as follows:

- (a) 30% if the agreement is concluded during stage 1; and
  - (b) 0% in any other case.
- (4) Where stage 1 has been started but no *settlement agreement* has been agreed before 1 March 2017:

- (a) if any agreement is reached to settle the case between the period from the end of stage 1 until the expiry of the period for making representations, or, if sooner, the date on which the representations are sent in response to the giving of a warning notice, there will be a reduction of 20% in the penalty; and
- (b) if any agreement is reached to settle the case between the expiry of the period of making representations, or, if sooner, the date on which representations are sent in response to the giving of a warning notice and the giving of a decision notice, there will be a reduction of 10% in the penalty.

6.7.3A G The reductions in penalty in cases involving a *focused resolution agreement* will be as follows.

- (1) Where agreement is reached in relation to all relevant facts and all issues as to whether those facts constitute a *breach* (or more than one *breach*):
  - (a) 30% if the agreement is concluded during stage 1; and
  - (b) 0% in any other case.
- (2) Where agreement is reached in relation to all relevant facts:
  - (a) 15 to 30% if the agreement is concluded during stage 1; and
  - (b) 0% in any other case.
- (3) Where the agreement reached does not fall within either *DEPP* 6.7.3AG(1) or *DEPP* 6.7.3AG(2):
  - (a) 0 to 30% if the agreement is concluded during stage 1; and
  - (b) 0% in any other case.
- (4) Where a *focused resolution agreement* is followed:
  - (a) before the end of stage 1, by a complete *settlement agreement*, the reduction is determined under *DEPP* 6.7.3G and not *DEPP* 6.7.3AG.
  - (b) after the end of stage 1, by a complete *settlement agreement*, the reduction is determined under *DEPP* 6.7.3AG and not *DEPP* 6.7.3G.

6.7.3B G The decision maker responsible for applying *DEPP* 6.7.3AG is:

- (1) The *settlement decision makers* in cases in which the *focused resolution agreement* is followed, after stage 1 has ended, by a complete *settlement*

agreement.

(2) The RDC in all other cases.

6.7.3C G Where DEPP 6.7.3AG specifies that the reduction will be within a range, the decision maker identified by DEPP 6.7.3BG will determine the appropriate figure within the range. Factors relevant to this determination may include:

(1) the extent to which the position taken by the person subject to enforcement action on the disputed issues at the time the focused resolution agreement is entered into is reflected in the terms of the decision notice.

(2) any saving of time or public resources as a result of the focused resolution agreement.

6.7.4 G (1) Any ~~settlement agreement~~ settlement agreement between the FCA and the person concerned will therefore need to include a statement as to the appropriate penalty discount in accordance with this procedure.

(2) In certain circumstances the person concerned may consider that it would have been possible to reach a settlement at an earlier stage in the action, and argue that it should be entitled to a greater percentage reduction in penalty than is suggested by DEPP 6.7.3G (3)(b). It may be, for example, that the FCA no longer wishes to pursue its action in respect of all the acts or omissions previously alleged to give rise to the breach. In such cases, the person concerned might argue that it would have been prepared to agree an appropriate penalty at an earlier stage and should therefore benefit from the discount which would have been available at that time. Equally, FCA staff may consider that greater openness from the person concerned could have resulted in an earlier settlement.

(3) Arguments of this nature risk compromising the goals of greater clarity and transparency in respect of the benefits of early settlement and invite dispute in each case as to when an agreement might have been possible. It will not usually be appropriate therefore to argue for a greater reduction in the amount of penalty on the basis that settlement could have been achieved earlier.

(4) However, in exceptional circumstances the FCA may accept that there has been a substantial change in the nature or seriousness of the action being taken against the person concerned, and that an agreement would have been possible at an earlier stage if the action had commenced on a different footing. In such cases the FCA and ~~person~~ person concerned may agree that the amount of the reduction in penalty should reflect the stage at which a settlement might otherwise have been possible or, where the settlement agreement is a focused resolution agreement, the decision maker identified by DEPP 6.7.3BG may take this into account when determining the appropriate figure within the applicable range.

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## Annex C

## Amendments to the Enforcement Guide (EG)

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

**Part 1: Comes into force 31 January 2017**

**2 The FCA's approach to enforcement**

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**2.2 Case selection: and referral criteria ~~Firms and individuals, market abuse cases and listing matters~~**

2.2.1 ~~Other than in the area of a *firm's* failure to satisfy the *FCA's Threshold Conditions* for authorisation (see *EG 2.3.1*), the selection method for cases involving *firms* and individuals, *market abuse* and listing matters (for example, breaches of the listing or prospectus *rules*) occurs at two main levels:~~

- ~~(1) strategic planning; and~~
- ~~(2) decisions on individual cases. [deleted]~~

...

2.2.6 ~~Before~~ In all cases, before it proceeds with an investigation, the *FCA* will satisfy itself that there are grounds to investigate under the statutory provisions that give the *FCA* powers to appoint investigators. ~~If the statutory test is met, it will decide whether to carry out an investigation after considering all the relevant circumstances. To assist its consideration of cases, the *FCA* has developed a set of assessment criteria. The current criteria (which are published on the Enforcement section of the *FCA* web site) are framed as a set of questions. They take account of the *FCA's* statutory objectives, its strategic/supervision priorities (see above) and other issues such as the response of the *firm* or individual to the issues being referred. Not all of the criteria will be relevant to every case and there may be other considerations which are not mentioned in the list but which are relevant to a particular case. The *FCA's* assessment will include considering whether using alternative tools is more appropriate taking into account the overall circumstances of the *person* or *firm* concerned and the wider context. Another consideration will be whether the *FCA* is under a Community obligation to take action on behalf of, or otherwise to provide assistance to, an authority from another *EU* member state. Paragraph *EG 2.5.1* discusses the position where other authorities may have an interest in a case. If the statutory test is met, the *FCA* will consider what is the most efficient and effective way of achieving its statutory objectives of protecting consumers, enhancing market integrity and promoting competition. A referral to~~

Enforcement for an investigation will be made if the FCA considers that an investigation, rather than an alternative regulatory response, is the right course of action given all the circumstances. Enforcement action and other regulatory tools can be used together and are not mutually exclusive. To assist in making the decision to refer a matter for investigation, the FCA has developed referral criteria that set out a range of factors it may consider when deciding whether to appoint enforcement investigators. The criteria are not exhaustive, and all the circumstances of a particular case are taken into account. Not all the criteria will be relevant to every case, and additional considerations may apply in certain cases. Any one of the factors alone may warrant the appointment of investigators and in some cases, including cases where *breaches* are self-reported, the misconduct may be so serious that there is no credible alternative to referral.

2.2.7 If a decision to refer an *individual* or *firm* to Enforcement is made, the FCA will explain and set out the criteria applied in coming to the decision to refer, and will give a summary of the circumstances and the reason(s) for the referral at the start of the investigation.

Case selection: disciplinary regulatory cases

2.2.8 The FCA's referral criteria are published on the Enforcement section of the FCA's website: <http://www.fca.org.uk/about/enforcement/referral-criteria>. In considering whether an enforcement investigation is likely to further the FCA's aims and objectives, the FCA will consider factors that address the following issues:

- (1) any available supporting evidence and the proportionality and impact of opening an investigation;
- (2) what purpose or goal would be served if the FCA were to end up taking enforcement action in the case; and
- (3) relevant factors to assess whether the purposes of enforcement action are likely to be met.

Case selection: markets cases

2.2.9 In relation to non-criminal *market abuse* investigations, the revised referral criteria will be similarly applied in deciding whether to open such an investigation. However, given the often limited alternatives to enforcement action available to address *market abuse* (with many of the subjects typically unauthorised), greater emphasis will be given to the egregiousness and deterrence value of a particular case when making such decisions.

Case selection: listing cases

2.2.10 As with *market abuse* cases, many of the non-enforcement tools are not available for use in cases involving listing regime *breaches*. This is because in many cases (aside from certain areas such as *sponsors* and *primary information providers*), there will be no on-going supervisory relationship with the listed companies in question, and no similar authorisation regime as there is with *authorised persons, firms* and *individuals*. As a result, the ability to use many of the early intervention tools or

restricting or limiting certain activities is not available and enforcement is likely to be the most effective (and sometimes only) regulatory tool available to address the misconduct.

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## 2.12 Co-operation

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- 2.12.2 On its web site, the *FCA* ~~has given~~ gives anonymous examples of where it has decided not to investigate or take enforcement action in relation to a possible *rule* breach because of the way in which the *firm* has conducted itself when putting the matter right. This is part of an article entitled ‘The benefits to firms and individuals of co-operating with the ~~FCA~~ *FCA*’. However, in those cases where enforcement action is not taken and/or a formal investigation is not commenced, the *FCA* will expect the *firm* to act promptly to take the necessary remedial action agreed with its supervisors to deal with the *FCA*'s concerns. If the *firm* does not do this, the *FCA* may take disciplinary or other enforcement action in respect of the original contravention.

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## 3 Use of information gathering and investigation powers

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### 3.10 Liaison where other authorities have an interest

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Information requests in joint investigations with the PRA

- 3.10.2 In certain circumstances, it will be appropriate and expedient for the *FCA* and *PRA* to issue a joint information request where there is a joint investigation. Where a joint information request is issued to a *firm* or *individual*, the request will make it clear to which investigation(s) it relates.

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## 4 Conduct of investigations

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### 4.8 Scoping discussions

- 4.8.1 For cases involving *firms*, *approved persons* or *conduct rules staff*, the *FCA* will generally hold scoping discussions with the *firm* or individuals concerned close to the start of the investigation (and may do so in other cases). The purpose of these discussions is to give the *firm* or individuals concerned in the investigation an indication of: why the *FCA* has appointed investigators (including the nature of and reasons for the *FCA*'s concerns); the scope of the investigation; how the process is

likely to unfold and an indication of the likely timing of the key milestones and next steps in the investigation; the individuals and documents the team will need access to initially and so on. There is may be a limit, however, as to how specific the *FCA* can be about the nature of its concerns in the early stages of an investigation. The *FCA* team for the purposes of the scoping discussions will normally include the nominated supervisor if the subject is a fixed portfolio relationship-managed firm.

- 4.8.2 In addition to the initial scoping discussions, there will be an ongoing dialogue with the *firm* or individuals throughout the investigative process. We will aim to give periodic updates at least on a quarterly basis covering the steps taken in the investigation to date as well as the next steps in the investigation and indicative timelines. Where the nature of the *FCA's* concerns changes significantly from that notified to the *person* under investigation and the *FCA*, having reconsidered the case, is satisfied that it is appropriate in the circumstances to continue the investigation, the *FCA* will notify the *person* of the change in scope.

#### 4.9 Involvement of FCA supervisors during the investigation phase

- 4.9.1 A clear division between the conduct of the investigation ~~on the one hand and the need to continue with the ongoing supervision of the firm on the other may mean that the investigation does not~~ means that clarity as to who is carrying out what work in important, so that the focus on the various needs of the investigation and supervisory function are not lost. It is also important that the investigation can benefit as much as it might otherwise do from the knowledge of the firm or individuals that the supervisors will have built up, or from their general understanding of the firm's business or sector. In most (if not all) cases, assistance from a referring area in informing the investigation team of certain matters (e.g. the firm's business model and market practice issues) will be helpful. ~~Before matters are referred to the Enforcement Division for investigation, FCA staff from its Enforcement Division will often work closely together with staff from the Supervision Division in order to determine the proper course of action to take.~~ Following a referral, the *FCA* takes the following general considerations into account in relation to the potential role of a supervisor in an investigation.

...

- (2) Such assistance will include: making the case team aware of the *firm's* business, history and compliance track record; the current supervisory approach to the area concerned; current issues with the firm; and acting as a sounding board on questions that emerge from the investigation about industry practices and standards and any market practice issues. Depending on the issues that arise, it may be appropriate for a supervisor to attend a progress meeting with the firm.

...

- (5) Where a firm's supervisor does not become part of the investigation team, the investigation will keep the firm's supervisor (or referring area) updated on the progress of the investigation.

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## 4.13 Preliminary findings letters and preliminary investigation reports

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- 4.13.3 In cases where it is sent, the preliminary findings letter will set out the facts which the investigators consider relevant to the matters under investigation (normally, as indicated above, by means of an annexed preliminary investigation report). And it will invite the *person* concerned to confirm that those facts are complete and accurate, or to provide further comment. *FCA* staff will allow a reasonable period (normally 28 days) for a response to this letter, and will take into account any response received within the period stated in the letter. They are not obliged to take into account any response received outside that period. If a *firm* or individual requests an extension to the period for responding to the preliminary findings report, the *FCA* will take into account all relevant factors, including the legal and factual complexity of the case, and whether there are any factors outside the control of the *firm* or individual that would materially impact on their ability to respond within the period set out in the preliminary findings letter.

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## 4.14 Joint investigations with the PRA

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- 4.14.2 In such cases, the guidance contained in this chapter will apply to the *FCA*'s investigation and the *FCA* will attempt to ensure that the subject of the investigation is not prejudiced or unduly inconvenienced by the fact that there are two investigating authorities. The *FCA* and *PRA* investigation teams will keep each other and their respective supervisory teams informed about the progress of the investigation. Discussions with the *firm* or individual under investigation should normally occur with the representatives of both regulators present.
- 4.14.3 Both the *FCA* and the *PRA* will seek to ensure that, as far as possible, their respective processes (whether for contested or settlement decision-making) occur in a coordinated and timely manner in a joint investigation. For example, the regulators will, where appropriate, endeavour to settle a joint investigation into a relevant *firm* or individual simultaneously.

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## 5 Settlement

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### 5.2 When settlement decisions may take place

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- 5.2.4 The *FCA* will engage senior management in discussions (either heads of department or directors), liaising where appropriate with the *settlement decision makers*, attending a without prejudice meeting during discussions or arranging for the

attendance of an appropriately senior FCA representative.

...

## **Part 2: Comes into force on 1 March 2017**

Amend the following as shown.

### **5.1 Settlement and the FCA – an overview**

...

5.1.2 The possibility of settlement does not, however, change the fact that enforcement action is one of the tools available to the *FCA* to secure our *statutory objectives*. The *FCA* seeks to change the behaviour not only of those subject to the immediate action, but also of others who will be alerted to our concerns in a particular area. There is no distinction here between action taken following agreement with the subject of the enforcement action and action resisted by a firm before the *RDC* (including action taken following a *focused resolution agreement*). In each case, the *FCA* must be satisfied that its decision is the right one, both in terms of the immediate impact on the subject of the enforcement action but also in respect of any broader message conveyed by the action taken.

...

5.1.4 In recognition of the value of early settlement, the *FCA* operates a scheme to award ~~explicit discounts~~ a discount for early settlement of cases involving financial penalties, suspensions, restrictions and disciplinary prohibitions. Details of the scheme, which applies only to settlement of cases where investigators were appointed on or after 20 October 2005, are set out in *DEPP* 6.7. This chapter provides some commentary on certain practical aspects of the operation of the scheme.

5.1.5 ~~Decisions~~ Some decisions on settlements and *statutory notices* arising from them are taken by two members of the *FCA's* senior management, rather than by the *RDC* (*DEPP* refers to these individuals as the '*settlement decision makers*'). Full details of the special decision making arrangements for settlements are set out in *DEPP* 5.

...

### **5.3 The basis of settlement discussions**

5.3.1 ~~As described above, the FCA operates special decision making arrangements under which members of FCA senior management take decisions on FCA settlements. This means that settlement discussions will take place without involving the RDC.~~

As set out in DEPP 5, special decision-making arrangements apply in relation to settlement. The person concerned may agree all relevant issues with the FCA (in which case the settlement decision makers will give all relevant statutory notices). Alternatively, a focused resolution agreement may be agreed (in which case the settlement decision makers are responsible for giving the warning notice and the RDC for giving any decision notice). The FCA would expect to hold any settlement discussions on the basis that neither FCA staff nor the person concerned would seek to rely against the other on any admissions or statements made if the matter is considered subsequently by the RDC or the Tribunal unless those admissions or statements are recorded in a focused resolution agreement. This will not, however, prevent the FCA from following up, through other means, on any new issues of regulatory concern which come to light during settlement discussions. The RDC may be made aware of the fact negotiations are taking place if this is relevant, for example, to an application for an extension of the period for making representations.

- 5.3.2 If the settlement negotiations result in a proposed settlement of the dispute, FCA staff will put the terms of the proposed settlement in writing and agree them with the person concerned. The settlement decision makers (and, as the case may be, the RDC) will then consider the settlement matter under the procedures set out in DEPP 5. A settlement is also likely to result in the giving of statutory notices (see paragraphs EG 2.15.1 to EG 2.15.3).

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## 5.5 The settlement discount scheme

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- 5.5.2 Normally, where the outcome is potentially a financial penalty, suspension, restriction, condition or disciplinary prohibition, the FCA will send a letter at an early point in the enforcement process to the subject of the investigation. This is what the FCA refers to as a stage 1 letter. The FCA will aim to give 28 days' notice of the beginning of stage 1 to allow the parties involved to make administrative arrangements, e.g. ensuring that key staff can be available to participate where necessary in any settlement discussions. Where appropriate, the FCA will offer a preliminary without prejudice meeting to explain the FCA's view of the misconduct (including the key factual and legal bases for our view), and to give the firm or individual an opportunity to identify where they believe there are errors in the factual basis and to indicate the extent to which they agree with the outline findings.

[Note: stage 1 is the period from commencement of an investigation until the FCA has a sufficient understanding of the nature and gravity of the breach to make a reasonable assessment of the appropriate penalty (or suspension, restriction, condition or disciplinary prohibition, or combination thereof). The FCA, at stage 1, also needs to have communicated that assessment to the person concerned and allowed a reasonable opportunity to reach agreement as to the amount of penalty or the length of any suspension, restriction, condition or temporary disciplinary prohibition.]

- 5.5.3 The settlement discount scheme does not apply to civil or criminal proceedings brought in the courts, or to ~~public ensure~~ censures, prohibition orders, withdrawal

of *authorisation* or approval, limitations of the period for which any approval is to have effect, or the payment of compensation or redress.

- 5.5.4 There is no set form for a stage 1 letter though it will always explain the nature of the misconduct, the *FCA's* view on ~~penalty~~ the sanction, and the period within which the *FCA* expects any settlement discussions to be concluded. In some cases, a draft *statutory notice* setting out the alleged *rule* breaches and the proposed ~~penalty~~ sanction may form part of the letter, to convey the substance of the case team's concerns and reasons for arriving at a particular ~~penalty figure~~ level of sanction. The *FCA* will identify the key evidence on which its case relies at the commencement of stage 1. While the *FCA* will identify the key evidence that underpins our outline findings, the *FCA* will not generally provide evidence where that evidence is already in the possession of the *firm* or individual.

...

- 5.5.6 The *FCA* considers that 28 days following a stage 1 letter will normally be the 'reasonable opportunity to reach agreement as to the amount of penalty' before the expiry of stage 1 contemplated by *DEPP* 6.7.3G. Extensions to this period will be granted in exceptional circumstances only, and factors that will be taken into account in considering an application will include the extent to which factors outside the *firm's* or individual's control will have a material impact on their ability to engage in settlement negotiations within the period set out in the stage 1 letter.

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## 6 Publicity

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### 6.2 Publicity during, or upon the conclusion of regulatory action

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Warning notice statements

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- 6.2.4 The decisions on whether to exercise the power to publish information about a *warning notice*, and if so what information to publish, will (subject to *EG* 6.2.4AG) be taken by the *RDC* after it has consulted with the *persons* to whom the *warning notice* has been given or copied. The procedure the *FCA* will follow when making these decisions is set out in *DEPP* 3.

- 6.2.4A Where the *settlement decision makers* decide to issue a *warning notice*, they shall also take the decision on whether to exercise the power to publish information about a *warning notice* and if so what information to publish. The *settlement decision makers* will consult with the *persons* to whom the *warning notice* has been given or copied. The *FCA* expects that the *settlement decision makers* are unlikely to decide it is appropriate to publish information about a *warning notice* where a *focused resolution agreement* has been entered into and where it is likely that a *final notice* will shortly follow, save in exceptional circumstances. The procedure the *FCA* will



follow when making these decisions is set out in *DEPP 5*.