

## PROXY ADVISORS (DEPP AND EG) INSTRUMENT 2019

### Powers exercised

- A. The Financial Conduct Authority (“the FCA”) makes this instrument in the exercise of:
- (1) the following powers and related provisions in the Financial Services and Markets Act 2000 (“the Act”):
    - (a) section 139A (Power of the FCA to give guidance);
    - (b) section 395 (The Authority’s procedures); and
  - (2) the powers of direction, guidance and related provisions in or under the following provisions of the Proxy Advisors (Shareholders’ Rights) Regulations 2019:
    - (a) regulation 16 (Statements of policy);
    - (b) regulation 22 (Application of Part 11 of the Act (information gathering and investigations)); and
    - (c) regulation 26 (Application of Part 26 of the Act (notices)).
- B. The rule-making provisions listed above are specified for the purposes of section 138G(2) (Rule-making instruments) of the Act.

### Commencement

- C. This instrument comes into force on 25 November 2019.

### 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.

### Material outside the Handbook

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

### Citation

- G. This instrument may be cited as the Proxy Advisors (DEPP and EG) Instrument 2019.

By order of the Board  
21 November 2019

## Annex A

### Amendments to the Glossary of definitions

In this Annex, all the text is new and is not underlined.

Insert the following new definition in the appropriate alphabetical position.

*Proxy Advisors (Shareholders' Rights) Regulations* the Financial Services and Markets Act 2000 (Proxy Advisors) Regulations 2019 (SI 2019/926).

## Annex B

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

In this Annex, underlining indicates new text.

2 Statutory notices and the allocation of decision making

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

...

UK Securitisation Regulations	Description	Handbook reference	Decision maker
...			
<u>Proxy Advisors (Shareholders' Rights) Regulations</u>	<u>Description</u>	<u>Handbook reference</u>	<u>Decision maker</u>
<u>Regulation 11</u>	when the <i>FCA</i> is <u>proposing or deciding to publish a statement under regulation 11</u>		<u>RDC or executive procedures</u>
<u>Regulation 12</u>	when the <i>FCA</i> is <u>proposing or deciding to impose a financial penalty under regulation 12</u>		<u>RDC or executive procedures</u>
<u>Regulation 25</u>	when the <i>FCA</i> is <u>proposing or deciding to require restitution under regulation 25</u>		<u>RDC</u>
<u>Regulation 32</u>	when the <i>FCA</i> is <u>proposing or deciding to remove a proxy</u>		<u>Executive procedures</u>

	<u>advisor from the public list.</u>		
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**Sch 3 Fees and other required payments**

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3.2G

The <i>FCA</i> 's power to impose financial penalties are contained in:
...
the <i>Small and Medium Sized Business (Finance Platforms) Regulations</i>
the <i>Proxy Advisors (Shareholders' Rights) Regulations</i>

**Sch 4 Powers Exercised**

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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> .
...
Application of Part 26 of the Act (notices) of the <i>UK Securitisation Regulations</i>
<u>Regulation 16 (Statement of policy on imposition of penalties) of the <i>Proxy Advisors (Shareholders' Rights) Regulations</i></u>
<u>Regulation 22 (Application of Part 11 of the Act (information gathering and investigations)) of the <i>Proxy Advisors (Shareholders' Rights) Regulations</i></u>
<u>Regulation 26 (Application of Part 26 of the Act (notices)) of the <i>Proxy Advisors (Shareholders' Rights) Regulations</i></u>

## Annex C

## Amendments to the Enforcement Guide (EG)

Insert the following new section, EG 19.37A, after EG 19.37 (UK Benchmarks Regulations). The text is not underlined.

**19.37A Proxy Advisors (Shareholders' Rights) Regulations 2019**

- 19.37A. The *Proxy Advisors (Shareholders' Rights) Regulations* in part implement the revised *Shareholders Rights Directive (SRD)*. The *FCA* has investigative and sanctioning powers in relation to breaches of the *Proxy Advisors (Shareholders' Rights) Regulations*.
- 19.37A. The *Proxy Advisors (Shareholders' Rights) Regulations* establish a new regulatory framework for *proxy advisors*. This framework imposes requirements on *proxy advisors* that are subject to the *Proxy Advisors (Shareholders' Rights) Regulations*, including, amongst other things, to provide a range of information to *proxy advisors'* clients and the public with the aim of providing greater transparency. The Regulations will ensure that where proxy advisor services are provided in accordance with or by reference to a Code of Conduct it is made public together with a report on the way it has been applied. They will also ensure that information is made public by which the quality and reliability of the *proxy advisor's* services and recommendations can be assessed and the *proxy advisor* will ensure that conflicts of interests and the management thereof are identified and disclosed appropriately. This framework will help to increase transparency in *proxy advisor* services and reduce the harm from investors relying on their services including their voting recommendations, without having the necessary information to assess the approach taken.
- 19.37A. The *FCA's* approach to enforcement under the *Proxy Advisors (Shareholders' Rights) Regulations* will mirror its general approach to enforcing the *Act*, as set out in *EG 2*. The *FCA* will seek to exercise its enforcement powers in a manner that is transparent, proportionate, 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.
- 19.37A. The regulatory powers which the *Proxy Advisors (Shareholders' Rights) Regulations* provide to the *FCA* include:

- the power to require information and appoint investigators;
- powers of entry and inspection;
- power of public censure;
- the power to impose financial penalties;
- the power to apply for an injunction or restitution order;
- the power to require restitution;
- the power to remove a proxy advisor from the public list; and
- the power to prosecute relevant offences.

19.37A. The *Proxy Advisors (Shareholders' Rights) Regulations*, for the most part, mirror  
5 the *FCA's* investigative, sanctioning and regulatory powers under the *Act*. The *FCA* has decided to adopt procedures and policies in relation to the use of those powers akin to those it has under the *Act*. Key features of the *FCA's* approach are described below.

The conduct of investigations under the Proxy Advisors (Shareholders' Rights) Regulations

19.37A. The *Proxy Advisors (Shareholders' Rights) Regulations* apply much of Part 11 of  
6 the *Act*. The effect of this is to apply the same procedures under the *Act* for appointing investigators and requiring information when investigating breaches of the *Proxy Advisors (Shareholders' Rights) Regulations*.

19.37A. The *FCA* will notify the subject of the investigation that it has appointed  
7 investigators to carry out an investigation unless notification is likely to prejudice the investigation or otherwise result in it being frustrated. The *FCA* expects to carry out a scoping visit early on in the enforcement process in most cases. The *FCA's* policy when investigating under the *Proxy Advisors (Shareholders' Rights) 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 Proxy Advisors (Shareholders' Rights) Regulations

19.37A. The *RDC* is the *FCA's* decision maker for most of the decisions under the *Proxy  
8 Advisors (Shareholders' Rights) Regulations* as set out in *DEPP 2 Annex 1G*. This includes the decision to publish a censure and the decision to impose a financial penalty. For the purposes of the *Proxy Advisors (Shareholders' Rights) Regulations*, the *FCA* will follow the procedure for issuing a *warning notice* and *decision notice* as set out in *DEPP 2*.

19.37A. For decisions made by *executive procedures* i.e. settlement decisions under  
9 Regulation 11 and 12 or proposals or decisions under Regulation 32, the procedures to be followed will be those described in *DEPP 4*.

19.37A. The *Proxy Advisors (Shareholders' Rights) Regulations* do not require the *FCA* to  
10 have published procedures for commencing criminal prosecutions. However, in

these situations the *FCA* expects that we will normally follow our decision-making procedures for the equivalent decisions under the *Act*, as set out in *EG* 12.

19.37A. The *Proxy Advisors (Shareholders' Rights) Regulations* do not require the *FCA* to  
11 have published procedures to apply to the court for an injunction or restitution order. However, the *FCA* will normally follow its decision-making procedures for the equivalent decisions under the *Act*, as set out in *EG* 10 and *EG* 11.

19.37A. The *Proxy Advisors (Shareholders' Rights) Regulations* require the *FCA* to give  
12 third party rights as set out in section 393 of the *Act* and to give access to certain material as set out in section 394 of the *Act*.

19.37A. Certain *FCA* decisions (for example the imposition of a financial penalty) may be  
13 referred to the *Tribunal* by an aggrieved party.

Imposition of penalties under the *Proxy Advisors (Shareholders' Rights) Regulations*

19.37A. The *Proxy Advisors (Shareholders' Rights) Regulations* do not require the *FCA* to  
14 issue a statement of policy with respect to the imposition and amount of penalties under the *Proxy Advisors (Shareholders' Rights) Regulations*. However, the *FCA* has decided to issue a statement of policy for the imposition of a financial penalty under the *Regulations*. The *FCA's* policy includes having regard to the relevant factors in *DEPP* 6.2 and *DEPP* 6.4 in addition to those set out in the *Proxy Advisors (Shareholders' Rights) Regulations*, where appropriate. The *FCA's* policy in relation to determining the level of a financial penalty includes having regard, where relevant, to *DEPP* 6.5 to *DEPP* 6.5D in addition to the factors set out in the *Proxy Advisors (Shareholders' Rights) Regulations*, where appropriate.

19.37A. As with cases under the *Act*, the *FCA* may settle or mediate appropriate cases  
15 involving breaches of the *Proxy Advisors (Shareholders' Rights) Regulations* to assist it to exercise its functions under the *Regulations* in the most efficient and economical way. See *DEPP* 5, *DEPP* 6.7 and *EG* 5 for further information on the settlement process and the *settlement discount scheme*.

Statement of policy in section 169(7) interviews (as applied by the *Proxy Advisors (Shareholders' Rights) Regulations*)

19.37A. The *Proxy Advisors (Shareholders' Rights) Regulations* apply section 169 of the  
16 *Act* which requires the *FCA* to publish a statement of policy on the conduct of certain interviews in response to requests from *overseas regulators*. For the purposes of the *Proxy Advisors (Shareholders' Rights) Regulations* the *FCA* will follow the procedures described in *DEPP* 7.