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DECISION PROCEDURES AND PENALTIES (DEPP)

Section 4 – REGULATORY PROCESSES

1. Decision Procedures and Penalties (DEPP)

This manual sets out the

- FCA's decision making procedures for decisions that involve issuing of statutory notices, these involve warning notices, decision notices and supervisory notices;
- FCA's policy with respect to the imposition of penalties;
- FCA's policy with respect to the conduct of interviews by investigators appointed in response to a request from an overseas regulator; and
- FCA's approach to publishing information about firms under investigation.

There are a number of notices that can be given and these are set out in the table below:

Notice	**Description**
Warning notice	A *warning notice* gives the recipient details about action that the FCA proposes to take and about the right to make representations.
Decision notice	A *decision notice* gives the recipient details about action that the FCA has decided to take.
Further decision notice	A *further decision notice* gives the recipient details about different action from that set out in a *decision notice* and which the FCA has decided to take concerning the same matter covered by the *decision notice*. The FCA may give a *further decision notice* only if the person to whom the original *decision notice* has given consent.
Notice of discontinuance	A *notice of discontinuance* identifies proceedings set out in a *warning notice* or *decision notice* and which are not being taken or are being discontinued.
Final notice	A *final notice* sets out the terms of the action that the FCA has decided on and the date it takes effect.
Supervisory notices	A *supervisory notice* gives the recipient details about action that the FCA has taken or proposes to take for example to vary a Part IV permission.

Decisions on whether to give a statutory notice will be taken by a "decision maker". "Decision Makers" will either be "FCA staff" or the "Regulatory Decisions Committee" (RDC). The RDC is a committee of the FCA Board. It is however separate from the FCA's executive management structure and apart from the Chairman none of the members are employees of the FCA.

<u>Penalties</u>

The FCA may decide to impose a financial penalty or issue a public censure. The purpose of this form of penalty is:

- to promote high standards of regulatory and market conduct;
- to deter firms or persons who have committed regulatory breaches from continuing to commit further breaches;
- to deter other firms from committing similar breaches; and
- to demonstrate the benefits of compliant behaviour.

In deciding whether to impose a financial penalty or public censure the FCA will take into consideration a number of facts. The following are some of the factors they would consider:

- The nature, seriousness and impact of the breach, including:
  - whether it was deliberate or reckless;
  - frequency;
  - the amount of any benefit gained or loss avoided as a result of the breach;
  - whether the breach reveals serious or systematic weaknesses in the firms systems and controls;
  - whether confidence in the markets has been damaged or put at risk;
  - loss to consumers;
  - if it involves any financial crime; and
  - whether a number of small issues collectively warrant discipline, if not individually.
- The conduct of the firm after the breach including:
  - whether the firm informed the FCA and if they did how quickly, effectively they did so;
  - degree of the firm's co-operation during the investigation;
  - remedial steps the firm had put in place;
  - likelihood that the same type of breach would re-occur if no action was taken;
  - whether the person involved has complied with other regulatory body rulings in relation to their behaviour; and
  - if the person has tried to mislead the FCA by providing false, incomplete or misleading information.
- The previous disciplinary record of the firm or person.
- FCA guidance and other published materials.
- Action taken by the FCA in similar cases.
- Action taken by other domestic or international regulatory authorities.

Action against approved persons

The FCA can take disciplinary action against an approved person where there is evidence of personal culpability on the part of the approved person. Personal culpability will arise where the behaviour is considered deliberate or the standard of behaviour is below that which would be reasonable. This could occur where the approved person has responsibility for managing the systems and controls, was aware of issues and weaknesses but did nothing to rectify them.

Financial Penalties

The FCA approach to imposing financial penalties on firms and individuals is based on three objectives:

- Disgorgement – a person should not benefit from any breach;
- Discipline – a firm or individual should be penalised for wrongdoing; and
- Deterrence – the financial penalty should be sufficient to deter the person who committed the breach and others from committing similar breaches.

These objectives are incorporated in a five-step process as follows:

1. STEP 1 – *disgorgement* - the removal of any financial benefit derived as a direct result of the breach
2. STEP 2 – *the seriousness of the breach* - the determination of a figure appropriate to the seriousness of the breach;
3. STEP 3 – *mitigating and aggravating factors* - an adjustment made to the Step 2 figure which takes any aggravating and mitigating circumstances into account;
4. STEP 4 – *adjustment for deterrence* - to ensure that the penalty has a deterrent effect, an upwards adjustment is made to the amount arrived at after Steps 2 and 3, where appropriate; and
5. STEP 5 – *settlement discount* - if applicable, a settlement discount will be applied. This discount reflects the timing of a settlement agreement and does not apply to disgorgement of any financial benefit derived directly from the breach.

The steps apply in all cases, although the details of Steps 1 to 4 will differ for cases against firms (DEPP 6.5A), cases against individuals (DEPP 6.5B) and market abuse cases against individuals (DEPP 6.5C).

At a minimum the penalty imposed will strip the individual or firm of any benefits that they received directly from the breach. For firms, the figure will usually be a percentage of their revenue from the relevant product or business area over the period of the breach. For individuals this will be a percentage of annual gross income over the period of the breach. For market abuse cases against individuals this will either be a percentage of their gross annual income over the period of breach, a multiple of the profit made or a minimum of £100,000.00 for the most serious cases, depending on which is greater.

Where a person claims that the penalty will cause them serious financial hardship then it may be reduced however this would only happen if its payment would result in the individuals income and capital falling below certain threshold levels.

Publishing Information – Warning Notice Statements

In a move towards more transparent regulation, the FCA now has the power to publish information about firms under investigation at the earlier warning notice stage. This allows it to make public the fact that it has begun formal disciplinary proceedings against a firm or individual. However, unlike final and decision notices, warning notices may not be published in their entirety. The power applies to notices where the FCA is proposing to censure, fine or suspend a firm or individual. It does not apply to non-disciplinary outcomes such as proposals to withdraw the approval of an individual or to cancel the permission of a firm.

The FCA must consult those to whom the warning notice is given or copied prior to publishing any information. It must not publish information if it considers that publication would be:

- unfair to the person with respect to whom the action was proposed to be taken;
- prejudicial to the interests of consumers; or
- detrimental to the stability of the UK financial system.

Where the decision is made to publish the statement, the FCA will also consider whether it is appropriate to identify the subject of the warning notice in the interests of enabling consumers, firms and market users to understand their concerns. If appropriate the FCA will make public the name of the firm or individual including any additional information to identify them and in the case of an approved person, it will also publish details of his/her employer at the time. Information is published in a *warning notice statement*.

Any warning notice statement the FCA publishes will make clear that the warning notice is not the final decision of the FCA and that the firm or individual involved has the right to make representations to the RDC which, in the light of those representations, will decide on the appropriate action and whether to issue a decision notice.