ENFORCEMENT MANUAL (PROHIBITION ORDERS AND PAYMENT OF PENALTIES BY INSTALMENTS) INSTRUMENT 2003

Powers exercised

A. The Financial Services Authority makes this instrument in the exercise of the following powers in the Financial Services and Markets Act 2000:

(1) section 124 (Statement of policy);

(2) section 157(1) (Guidance); and

(3) section 210 (Statements of policy).

Commencement

B. This instrument comes into force on 1 February 2003.

Amendments to the Enforcement manual

C. The Enforcement manual is amended in accordance with the Annex to this instrument.

Citation

D. This instrument may be cited as the Enforcement Manual (Prohibition Orders and Payment of Penalties by Instalments) Instrument 2003.

By order of the Board
16 January 2003

Annex

Amendments to the Enforcement manual

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

8.1.2G The power to prohibit individuals who are not fit and proper from carrying out functions in relation to *regulated activities* helps the *FSA* to work towards its *regulatory objectives* of protecting *consumers*, promoting public awareness, maintaining market confidence in the *financial system* and reducing *financial crime*. The *FSA* may exercise its power to make a *prohibition order* where it considers ~~an individual presents such a risk to *consumers* or to confidence in the market generally~~ that, to achieve any of those objectives, it is necessary either to prevent ~~him~~ an individual from carrying out any function in relation to *regulated activities* or from being employed by any *firm*, or to restrict the functions which he may carry out or the type of *firm* by which he may be employed.

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8.4.3G The *FSA* recognises that its decision to make a *prohibition order* will have a substantial impact on the individuals concerned and, where relevant, their employers. When it decides whether to make a *prohibition order,* the *FSA* will consider all relevant circumstances including whether other enforcement action should be taken or has already been taken against the individual by the *FSA*. The *FSA* will also consider whether enforcement action has been taken against the individual by other enforcement agencies or *designated professional bodies*. Depending on the circumstances of the case, it may be appropriate to prohibit the individual from performing only certain functions in relation to *regulated activities* carried on by certain *firms*. Alternatively, the *FSA* may consider it necessary to prevent the individual concerned from performing any functions in relation to any *regulated activities* carried on by any *firm*.-

~~ENF 8.4.4G~~ ~~The *FSA* considers that a *prohibition order* is a more serious penalty than the withdrawal of approval because a *prohibition order* will usually be much wider in scope. In most cases the *FSA* will consider whether the particular unfitness can be adequately dealt with by withdrawing approval or other disciplinary sanctions, for example, public censure or financial penalties, or by issuing a private warning. The *FSA* will consider making a *prohibition order* only in the most serious cases of lack of fitness and propriety. In those cases the *FSA* may consider it necessary to prevent the individual concerned from performing any functions in relation to any *regulated activities* carried on by any *firm*. Where the individual concerned is not an *approved person* the *FSA* will not have the option of withdrawing approval or exercising its disciplinary powers in relation to the individual concerned and therefore a *prohibition order* may be the only appropriate action available.~~

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8.5.1G When the *FSA* has concerns about the fitness and propriety of an *approved person*, it may consider whether it should seek to withdraw his approval, prohibit him from conducting *regulated activities*, or both. *ENF* 7 (Withdrawal of approval) sets out the *FSA's* approach to the use of its power to withdraw approval in relation to individuals who are *approved persons*. The grounds on which the *FSA* may withdraw approval are similar to the grounds on which the *FSA* may consider exercising its power to make a *prohibition order* against individuals who are *approved persons*. ~~The *FSA* considers that the prohibition of an individual who is an *approved person* may have more serious consequences than the withdrawal of approval for a particular *controlled function*. A *prohibition order* will be wider in scope than the withdrawal of approval (see *ENF* 8.3.2G). Accordingly, a *prohibition order* will be used only where the *approved person* is an individual and presents a degree of risk to *consumers* or to confidence~~

~~in the *financial system* that cannot be sufficiently addressed by the withdrawal of his approval or other disciplinary sanction.~~

8.5.1AG The *FSA* will consider in each case whether its *regulatory objectives* of maintaining market confidence in the *financial system*, promoting public awareness, protecting *consumers* and reducing *financial crime* can adequately be achieved by withdrawing approval or disciplinary sanctions, for example, public censure or financial penalties, or by issuing a private warning. The *FSA* considers that a *prohibition order* generally has more serious consequences than the withdrawal of approval because a *prohibition order* will usually be wider in scope (see *ENF* 8.3.2G). It is therefore likely that the *FSA* will consider making a *prohibition order* against *approved persons* only in the more serious cases of lack of fitness and propriety where it considers that the other powers available to it are not sufficient to achieve the *FSA's regulatory objectives*.

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8.6 **Prohibition orders against individuals employed or formerly employed by firms but who are not approved persons**

8.6.1G Where the *FSA* considers making a *prohibition order* against an individual employed or formerly employed by a *firm* who is not an *approved person*, it may make an order only on the grounds that the individual is not fit and proper to carry out functions in relation to *regulated activities* carried on by an *authorised person*.

8.6.1AG Where the individual concerned is not an *approved person*, the *FSA* will not have the option of withdrawing approval of exercising its disciplinary powers in relation to the individual concerned and therefore a *prohibition order* may be the only appropriate action available. In these cases, the *FSA* will consider the severity of the risk posed by the individual. It may prohibit the individual where it considers it necessary to achieve the *FSA's regulatory objectives* of maintaining market confidence in the *financial system*, promoting public awareness, protecting *consumers* and preventing *financial crime*.

8.6.2G When considering whether to exercise its power to make a *prohibition order* against an individual employed or formerly employed by a *firm* who is not an *approved person*, the *FSA* will consider those factors set out in *ENF* 8.5.2G (1), *ENF* 8.5.2G (3), *ENF* 8.5.2G (5) and, if relevant, *ENF* 8.5.2G (6).

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8.7.1AG In cases where it is considering whether to exercise its power to make a *prohibition order* against an individual carrying on *exempt regulated activities* by virtue of an exemption from the *general prohibition* under Part XX of the *Act*, the *FSA* will consider whether the particular misconduct might be more appropriately dealt with by making an order disapplying the exemption using its power under section 329 of the *Act*. In most cases where the *FSA* is concerned about the fitness and propriety of a specific individual engaged in *exempt regulated activities* by virtue of an exemption under Part XX, it will be more appropriate to consider whether to make an order prohibiting the individual from performing functions in relation to *exempt regulated activities* than to make a disapplication order (see *ENF* 18.4.3G).

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8.8.1G The *guidance* in *ENF* 8.8 applies to individuals, other than individuals referred to in *ENF* 8.5 to *ENF* 8.7. The *FSA* will consider exercising its power to make a *prohibition order* against such individuals ~~who are not *approved persons* nor employed by *firms*~~ where they have shown themselves to be unfit to carry out functions in relation to *regulated activities*.

…

8.8.2AG In cases where it is considering whether to exercise its power to make a *prohibition order* against individuals not referred to in *ENF* 8.5 to *ENF* 8.7, the *FSA* will not have the option of considering whether other enforcement action may adequately deal with the misconduct in question. In these cases, the *FSA* will consider the severity of the risk posed by the individual. It may prohibit the individual where it considers this is necessary to achieve the *FSA's regulatory objectives* of maintaining confidence in the *financial system*, promoting public awareness, protecting *consumers* and reducing *financial crime*.

8.8.3G When determining the fitness and propriety of an individual, who is not an individual referred to in *ENF* 8.5 to *ENF* 8.7 ~~who is neither an approved person nor employed by a firm~~, the *FSA* will consider the criteria set out in *ENF* 8.5.2G (1), (3) and (5).

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13.3.6G A *firm* (or *approved person*) may ask the *FSA* to permit the *firm* (or *approved person*) to pay a financial penalty by instalments. However, the *FSA* will consider agreeing to payment of a financial penalty by instalments only where there is verifiable evidence of serious financial hardship or financial difficulties if the *firm* or *approved person* were required to pay the full payment in a single instalment. This reflects the fact that the purpose of a penalty is not to render a *firm* or *approved person* insolvent or to threaten solvency. The *FSA* will determine the appropriate level and number of instalments having regard to the overall circumstances of the case. However, the period within which the full payment of the penalty must be made will not generally exceed one year from the date of the *final notice*.

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13.5.8G *ENF* 13.3.6G contains *guidance* concerning requests for permission to pay financial penalties by instalments. That *guidance* also applies to penalties for late submission of reports.

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14.7.6G A *person* may ask the *FSA* to permit the *person* to pay a financial penalty in a *market abuse* case by instalments. However, the *FSA* will consider agreeing to payment of a financial penalty by instalments only where there is verifiable evidence of serious financial hardship or financial difficulties if the *person* were required to pay the full payment in a single instalment. This reflects the fact that the purpose of a penalty is not to render a *person* insolvent or to threaten solvency. The *FSA* will determine the appropriate level and number of instalments having regard to the overall circumstances of the case. However, the period within which the full payment of the penalty must be made will not generally exceed one year from the date of the *final notice*.