



## **5. ENFORCEMENT**

### **5.1 Our approach to enforcement**

#### **Introduction**

- 5.1.1 This Chapter sets out our approach to enforcement including how we may commence and conduct investigations and exercise our powers to address any misconduct or contravention of the FSMR or Rules. Our approach to imposing a penalty can be found in Chapter 6 of this document.
- 5.1.2 The fair and proportionate use of our enforcement powers plays a critical role in fulfilling our objectives as set out in section 1(3) of FSMR.
- 5.1.3 There are a number of principles underlying our approach to the exercise of our enforcement powers, including:
- (a) the effectiveness of the regulatory regime depends on the maintenance of an open and co-operative relationship between us and those we regulate;
  - (b) we adopt a risk-based approach to regulation, focusing our efforts on those activities that we perceive as posing the greatest risk to the furtherance of our objectives;
  - (c) we will act fairly, openly, accountably and proportionally in the exercise of our enforcement powers;
  - (d) we will act swiftly and decisively to stop conduct which threatens the integrity of the ADGM or the stability of the financial services industry in the ADGM, minimise its effects, and prevent such conduct re-occurring;
  - (e) we aim to:
    - (i) deter or reduce the likelihood of future non-compliance;
    - (ii) reduce or eliminate any financial gain or benefit from non-compliance; and
    - (iii) where appropriate, remedy the harm caused by the non-compliance.

### **5.2 Enforcement framework**

#### **Introduction**

- 5.2.1 Enforcement is one of a number of regulatory tools available to us. We will take enforcement action in line with our objectives and approach to enforcement and may conduct investigations where there is a suspected contravention.



- 5.2.2 As a risk-based regulator, priority will be given to those areas which pose the biggest risk to achieving our objectives.
- 5.2.3 The proactive supervision and monitoring of Authorised Persons and an open and co-operative relationship between such Authorised Persons and their supervisors may, in some cases where a contravention of the FSMR or Rules has taken place, lead us to decide against taking formal disciplinary action. In those cases, we would expect the firm or person to act promptly in taking the necessary remedial action agreed with its supervisors to deal with our concerns. If the firm or person does not take such action, we may then proceed to take formal enforcement action.

#### **General contravention provisions**

- 5.2.4 Pursuant to section 218 of FSMR, a person commits a contravention if he:
- (a) does an act or thing that the person is prohibited from doing by or under the FSMR or Rules;
  - (b) does not do an act or thing that the person is required or directed to do by or under the FSMR or Rules;
  - (c) fails to comply with a requirement or condition imposed by or under the FSMR or the Rules; or
  - (d) otherwise contravenes a provision of the FSMR or Rules.

#### **Involvement in contravention**

- 5.2.5 If a person is Knowingly Concerned in a contravention of the FSMR or Rules committed by another person then, under section 220 of FSMR, both persons may be held liable for committing a contravention.
- 5.2.6 A person is "Knowingly Concerned" in a contravention if the person:
- (a) has aided, abetted, counselled or procured the contravention;
  - (b) has induced, whether by threats or promises or otherwise, the contravention;
  - (c) has in any way, by act or omission, directly or indirectly, been knowingly involved in or been party to, the contravention; or
  - (d) has conspired with another or others to commit the contravention.

#### **Enforcement assessment: Threshold Conditions cases**

- 5.2.7 We may take enforcement action against an Authorised Person who no longer meets the Threshold Conditions. . We view the Threshold Conditions as being fundamental requirements for a firm operating within the ADGM under a Financial Services Permission.



### **Decision to take action**

5.2.8 We will make an assessment on a case by case basis whether to carry out a formal investigation, having considered all the available information, including:

- (a) elements of suspected contravention of the FSMR or Rules;
- (b) the Authorised Person's willingness to co-operate with us;
- (c) whether confidentiality obligations prevent individuals from providing information unless we compel them to do so by using our formal powers; and
- (d) whether the Authorised Person concerned has undertaken, or offered to undertake, remedial action.

### **Enforcement process**

5.2.9 When taking enforcement action, we will generally adopt the following process:

- (a) Step 1 - Assessment of complaints and referrals (paragraph 5.3);
- (b) Step 2 - Commencement of an investigation (paragraph 5.4);
- (c) Step 3 - Information gathering (paragraph 5.5);
- (d) Step 4 – Analysis of information provided (paragraph 5.7);
- (e) Step 5 - Assessment of remedies (paragraph 5.8); and
- (f) Step 6 - Conclusion of the investigation (paragraph 5.19).

## **5.3 Step 1 - Assessment of complaints and referrals**

5.3.1 Assessment of complaints and referrals concerning suspected misconduct or suspected contraventions is a key function of our regulatory remit and enforcement framework. Every complaint and referral, regardless of source, is assessed to determine whether an investigation or other action ought to take place.

### **Sources of complaints and referrals**

5.3.2 We may become aware of suspected misconduct or suspected contraventions from a variety of sources, including:

- (a) members of the public;
- (b) our supervisory activities; and
- (c) other external regulatory authorities or law enforcement agencies.



## **Complaints**

5.3.3 Complaints received by us from members of the public which relate to:

- (a) any conduct of, or dissatisfaction with, any person regulated by us;
- (b) a potential contravention of the FSMR or Rules; or
- (c) any conduct that causes, or may cause, damage to the reputation of the ADGM or the financial services industry in the ADGM;

are classified as regulatory complaints and are assessed through our complaints management function.

5.3.4 A person wishing to lodge a regulatory complaint with us should, where possible, do so in writing. A complaint can be lodged:

- (a) by email to: [FSRA.Complaints@adgm.com](mailto:FSRA.Complaints@adgm.com);
- (b) by sending the complaint to Financial Services Regulatory Authority, Abu Dhabi Global Market PO Box 111999, Abu Dhabi, United Arab Emirates; or
- (c) delivering the complaint to us at Financial Services Regulatory Authority, Abu Dhabi Global Market Square, Al Maryah Island Abu Dhabi, United Arab Emirates.

5.3.5 When a complaint is received, we will send an acknowledgement letter to the complainant which will include the contact details of our complaints management function.

5.3.6 If, during the assessment of a regulatory complaint, we identify suspected misconduct or a suspected contravention, we will refer the complaint to the relevant staff member. After that, the relevant department assumes responsibility for the complaint and undertakes further consideration of the complaint.

5.3.7 All complaints lodged with us are held in confidence in accordance with the FSMR. However, in order to assess a complaint properly, we may need to speak to third parties including any person who is the subject of the complaint.

## **Referrals**

5.3.8 There are two types of referrals - internal and external.

- (a) Internal referrals

Internal referrals originate from our supervisory activities. Our supervisory framework is designed to detect and mitigate risks to the ADGM and the financial services industry in the ADGM.



An internal referral occurs when our supervision division refers a matter to our enforcement department, when the supervisory department has identified possible contraventions.

When the enforcement division receives an internal referral, the referring division may continue to be responsible for the on-going supervision of the firm who may be the subject of the referral.

(b) External referrals

We may also receive allegations of misconduct through an external referral from other regulatory authorities and law enforcement agencies or any other person.

Such allegations may be received pursuant to the IOSCO or IAIS Multilateral Memoranda of Understanding (MMoU), or bilateral arrangements for the exchange of information between us and other regulatory and enforcement agencies.

## 5.4 Step 2 - Commencement of investigations

### Introduction

- 5.4.1 On receipt of an internal or external referral, the allegation will be assessed to determine if there is a suspicion of a contravention. If a suspicion arises and it is appropriate and expedient, we may start an investigation.

Section 205 of FSMR empowers us to conduct investigations if we consider there is good reason to do so, including investigations into reasonable suspicions of contraventions of FSMR and Rules.

- 5.4.2 In determining whether to commence an investigation, we will consider a number of factors including:

- (a) the nature and seriousness of the suspected contravention;
- (b) whether the suspected contravention is on-going;
- (c) whether the suspected contravention affects, or has the potential to affect, our objectives;
- (d) whether those involved in the suspected contravention are likely to co-operate;
- (e) the disciplinary record and compliance history of the person(s) involved in the suspected contravention;
- (f) whether, if proven, a suitable remedy is available;



- (g) the extent to which another law enforcement agency or Non-ADGM Financial Services Regulator can adequately address the matter;
- (h) the nature of any request for assistance made by another regulator or body under sections 216 or 217 of FSMR; and
- (i) whether any party who may have suffered a detriment as a result of the suspected contravention is able to take his own remedial action.

5.4.3 Whether we "reasonably suspect" a contravention is a question which we will determine on the facts and circumstances available at the time of the determination to commence investigation.

5.4.4 While we are not bound to disclose to any party that an investigation has commenced or is on-going, or the basis on which an investigation is commenced, we may where necessary or desirable to do so, notify a person who is the subject of an investigation that an investigation has commenced, and the nature of our investigation.

5.4.5 We will not normally make public the fact that we are investigating a matter. We also expect that the person who is the subject of an investigation will treat the matter as confidential. However, subject to the restrictions on disclosure of confidential information in sections 197 and 198 of the FSMR, this does not stop the person under investigation from seeking professional advice or making their own enquiries into the matter, giving their Auditors appropriate details of the matter or making notifications required by law.

## **5.5 Step 3 - Information gathering**

### **Introduction**

5.5.1 Once an investigation has commenced, we may exercise our powers to gather information to advance our objectives.

5.5.2 Our information-gathering powers may only be exercised by the Chief Executive or his delegate(s). The delegation need not be limited to our employees and can extend to other, non FSRA staff who are able to assist the investigation.

### **Power to require documents or information**

5.5.3 During an investigation, the investigator may obtain relevant information and/or documents either: on a compulsory basis, principally through the exercise of its powers under section 206(1)(b) and (c) of FSMR, and/or on a voluntary basis.

5.5.4 Our compulsory information gathering powers are divided into two broad categories – supervisory and investigative. When we require the giving of information or production of documents, we will generally give the Person a written notice specifying what is required to be given or produced.



- 5.5.5 Under our supervisory powers, we may require a Person to give us information and produce documents about its business under section 201 of the FSMR. The power of section 201 of FSMR permits us to request information and documents from an Authorised Person, Recognised Body, Issuer of Securities admitted to the Official List and any director, officer, employees or agent of such Authorised Person, Recognised Body or Issuer, which we consider is necessary or desirable to meet our objectives.
- 5.5.6 Under our investigative powers, we also have the power to require documents or information under section 206(1)(b) and (c) of the FSMR. Unlike the supervisory power under s201, the powers under section 206 may only be used:
- (a) for the purposes of an investigation; and
  - (b) in circumstances where the investigator considers that a person is or may be able to give information or produce a document which is or may be relevant to an investigation.

#### **Power to Inspect and copy documents**

- 5.5.7 The section 206(1)(e) of FSMR permits the investigator to enter the business premises of the person under investigation for the purpose of inspecting and copying documents.
- 5.5.8 The investigator will generally not provide prior notice of an inspection in circumstances where the provision of prior notice may prejudice the investigation.
- 5.5.9 When exercising this power, the investigator may:
- (a) require any appropriate person to:
    - (i) make available any relevant information stored at the business premises for inspection or copying; or
    - (ii) convert any relevant information into a physical form capable of being copied; and
  - (b) use the facilities of the occupier of the business premises where appropriate and necessary, free of charge, to make copies.

#### **Power to require production of information**

- 5.5.10 Section 206(1)(c) of FSMR empowers the investigator to require a person to give, or procure the giving of, information. The term "information" should be interpreted broadly, in accordance with its ordinary meaning, and may include
- (a) knowledge communicated or received concerning a particular matter, fact or circumstance;



- (b) knowledge gained through work, commerce, study, communication, research or instruction;
- (c) data obtained as output from a computer by means of processing input data with a program or any data at any stage of processing including input, output, storage or transmission data;
- (d) an explanation or statement about a matter;
- (e) the identification of a person, matter or thing; or
- (f) the provision of a response to a question.

#### **Power to require production of documents**

5.5.11 Section 206(1)(b) of FSMR empowers the investigator to require a person to produce, or procure the production of, specified documents or documents of a specified description. Specified documents may include, for example, any record of information, including:

- (a) anything on which there is writing;
- (b) anything on which there are marks, figures, symbols or perforations having a meaning for persons qualified to interpret them;
- (c) anything from which sounds, images or writings can be reproduced with or without the aid of anything else; or
- (d) a map, plan, drawing or photograph.

5.5.12 Section 206(1)(b) of FSMR empowers the investigator to require production of original documents or copies.

5.5.13 When exercising his powers under section 206(1)(b) of FSMR, the investigator may retain possession of any original document for as long as is necessary for the investigation to which the notice relates. When a person is unable to produce documents in compliance with a requirement made by the investigator, the investigator may require the person to state, to the best of that person's knowledge or belief, where the documents may be found and who last had possession, custody or control of those documents.

#### **Time for responding to information and document requirements**

5.5.14 As delays in the provision of information and/or documents can have an adverse impact on the efficient and effective progression of an investigation, we expect persons to respond to information and document requests within the timeframe required by us, in particular where a deadline for submission has been imposed.



### **Power to require a Person to attend an interview**

- 5.5.15 Section 206(1)(a) of FSMR empowers the investigator has the power to require a person (the interviewee) to attend before us (the interviewer) for an interview to provide oral evidence relevant to an investigation we are conducting.
- 5.5.16 A person attending an interview will first be served with a written notice requiring his attendance. Pursuant to section 206(5) of FSMR, an interviewee is not entitled to refuse or fail to answer a question on the basis that his answers may incriminate him, make him liable for a penalty or reveal communications made in confidence (subject to section 209(6) of the FSMR).
- 5.5.17 An interview will be conducted in private and the interviewer may give directions to the interviewee regarding:
- (a) who may be present during the interview;
  - (b) swearing an oath, or giving an affirmation, that the answers provided will be true;
  - (c) what, if any, information may be disclosed by the interviewee or any other person present at the interview to any third party;
  - (d) the conduct of any person and the manner in which they will participate during the interview; and
  - (e) answering any question which is relevant to the investigation.
- 5.5.18 An interviewee is entitled to legal representation during the course of an interview.

### **Power to require a Person to provide assistance**

- 5.5.19 Section 206(1)(d) of FSMR empowers the investigator to require a person to provide assistance in relation to an investigation, which may include requiring a person to do a physical act or provide information to advance an investigation. For example, it may require a person to assist in the location of specific documents.
- 5.5.20 This power can be used independently, or in conjunction with, the exercise of other investigative powers. For example, the investigator can exercise its powers under section 206(1)(a) of FSMR to require a person to attend an interview and under section 206(1)(d) of FSMR, to require the interviewee to provide reasonable assistance during or after the interview. For example, the interviewee may be required, during the interview, to explain the context of a document shown to him, or, after the interview, to locate and later produce a document referred to during the interview.



## **5.6 Power to enter the premises for the purposes of an investigation**

- 5.6.1 For the purposes of an investigation conducted under section 205 of FSMR, we may require any Authorised Person or Recognised Body to allow entry on to the premises (during normal business hours or at any other time as may be agreed) for the purpose of inspecting and copying information or documents (at the relevant person's expense).
- 5.6.2 We will provide reasonable notice to an Authorised Person, Recognised Body, or other person when we seek information, documents or access to premises. In exceptional circumstances, such as where any delay may be prejudicial to the interests of the ADGM, we may seek access to premises without the giving of prior notice.

### **Confidentiality**

- 5.6.3 When carrying out our regulatory functions, we must maintain confidentiality of information, unless disclosure is permitted by section 199 of FSMR. We have issued a separate policy statement on Confidentiality and it is available on our website.
- 5.6.4 We may also impose obligations of confidentiality in respect of information and documents provided during the exercise of an investigator's powers under section 206(1) of FSMR.
- 5.6.5 The investigator can make directions to protect the confidentiality of information and documents which are part of an interview, in accordance with section 206(4)(b) of FSMR.
- 5.6.6 We or our investigator conducting an interview pursuant to section 206(1)(a) of FSMR may direct any person present during the interview from disclosing any information provided to the interviewee or questions asked by the interviewer during the interview.
- 5.6.7 Directions under section 206(4) of FSMR are made to ensure that an investigation is not prejudiced by the disclosure of the nature of the information sought or the questions asked during an investigation. In each case, we need to consider whether or not such directions are appropriate in the circumstances of that matter.

### **Protections**

- 5.6.8 Parties who are required to comply with a requirement made by us during the course of an investigation, and persons who are the subject of an investigation, may benefit from certain protections in the FSMR, including:
- (a) section 198, which provides that confidential information provided to us must not be disclosed except in certain limited circumstances;
  - (b) section 207(2), which provides that where a person takes part in an interview, any statements made during the interview cannot be disclosed by



the investigator to a law enforcement agency for the purpose of criminal proceedings unless the person consents to the disclosure or the investigator is required by law or court order to disclose the statement; and

- (c) claims of legal professional privilege and other protections (see paragraph 5.6.9 – 5.6.10 below)

#### **Claims of privilege and other protections**

5.6.9 As set out in sections 210 and 211 of FSMR, there are a number of limitations on our powers to require documents and information.

5.6.10 we will recognise a valid claim for Legal Professional Privilege (LPP), made by:

- (a) the privilege holder, or
- (b) a third party seeking to assert the LPP claim on behalf of the privilege holder.

#### **Non-compliance with requirements**

5.6.11 Pursuant to section 214 of FSMR, a person must not, without reasonable excuse, engage in conduct that is intended to obstruct us in the exercise of our investigative powers by any means, including:

- (a) the failure to attend at a specified time and place to answer questions;
- (b) the falsification, concealment or destruction of documents;
- (c) the failure to give or produce information or documents specified by us
- (d) the failure to provide assistance in relation to an investigation which the person is able to give.

5.6.12 We will regard any breach of a requirement under Part 17 of FSMR as serious and take appropriate action where necessary.

#### **Return of information and documents**

5.6.13 Where, during the course of an investigation, we have obtained original documents, we will usually return these to the person from whom the documents were received, as soon as practicable after the conclusion of the investigation or related proceedings.

5.6.14 Where information or documents have been produced to us in the course of an investigation to assist another regulator or agency, we may release the information or documents to that other regulator or agency. The information and documents will usually be returned to the person from whom the information and documents were received, as soon as practicable after receiving them back from the other regulator or agency.



## **5.7 Step 4 – Analysis of information provided**

5.7.1 On completion of the information gathering step, we will carefully consider all the relevant facts and circumstances of the matter to determine:-

- (a) whether there has been a contravention of the FSMR or the Rules; and
- (b) if so, if there is a regulatory benefit of pursuing the contravention in question.

5.7.2 The effective and proportionate use of our powers to enforce the requirements of the FSMR and the Rules will play an important role in our pursuit of our objectives as set out in section 1(3) of the FSMR. Imposing financial penalties, public censures and other disciplinary measures shows that we are upholding regulatory standards and helps to maintain market confidence and deter financial crime.

5.7.3 However, they are not the only tools available to us, and there will be instances of non-compliance which we consider appropriate to address without the use of such tools. For example, consistent with our risk-based approach to regulation, activities that are not seen as posing a significant risk to the furtherance of our objectives may not attract the same remedies as activities which we are seeking to prioritise.

5.7.4 At the conclusion of an investigation, we may:

- (a) take no further action;
- (b) commence a settlement negotiation;
- (c) accept a settlement;
- (d) accept an enforceable undertaking;
- (e) refer a matter for determination to a delegated decision-maker, e.g. for the
  - (i) imposition of a financial penalty;
  - (ii) imposition of a public censure;
  - (iii) variation or cancellation of a Financial Services Permission;
  - (iv) imposition of conditions on an Approved Person;
  - (v) suspension or withdrawal of an Approved Person's Approval; or
  - (vi) revocation of recognition of a Recognised Body;
- (f) commence Court proceedings; or
- (g) exercise a power on behalf of another regulator.



## **5.8 Step 5 - Assessment of Remedies**

5.8.1 There is a range of remedies which we may pursue to achieve our objectives, including:

- (a) financial penalties;
- (b) public censure;
- (c) private warning; and
- (d) injunctions and other court orders.

5.8.2 We may, in any matter, pursue more than one remedy.

5.8.3 We do not have criminal jurisdiction. Should criminal conduct be identified, it will be referred to the appropriate law enforcement agency.

## **5.9 Financial penalties**

5.9.1 We may seek to impose a financial penalty under section 232 of FSMR on a person whom we consider has contravened a provision of the FSMR or the Rules. We may impose a financial penalty in any amount considered appropriate, provided such amount is not less than 5,000 UAE Dirhams and not exceeding the higher of 50 million UAE Dirhams or 10% of the value of the relevant transaction.

5.9.2 In determining whether to impose a financial penalty, and the quantum of the financial penalty, we will take into consideration the circumstances of the conduct and will be guided by the penalty guidance set out in Chapter 6 of this document.

5.9.3 Prior to making a decision, we will follow the procedures set out in Part 21 of the FSMR (see also Chapter 7 of this document for guidance).

## **5.10 Public censure**

5.10.1 We may, under section 231 of FSMR, seek to publicly censure a person whom we consider has contravened a provision of the FSMR and Rules.

5.10.2 In determining whether to publicly censure a person, we will take into consideration the circumstances of the conduct and will be guided by the penalty guidance set out in paragraph 6.3 of this document.

## **5.11 Private warnings**

5.11.1 In certain cases, despite concerns about a person's behaviour or evidence of a breach of the FSMR or the Rules, we may decide that it is not appropriate, having regard to all the circumstances of the case, to bring formal action for a financial penalty or public censure, or that an alternative regulatory outcome is preferable in light of the



circumstances of the case. This is consistent with our risk-based approach to enforcement.

- 5.11.2 Private warnings is a non-statutory tool, primarily used by us as an enforcement tool, but they may also be used in other departments. Whilst a private warning is not intended to be a determination by us as to whether the recipient has breached a provision of the FSMR or the Rules, private warnings, together with any comments received in response, will form part of the person's compliance history.

#### **Instances where we may issue a private warning**

- 5.11.3 We may give a private warning rather than take formal action where the matter giving cause for concern is minor, or where the person has taken full and immediate remedial action. In any event, we will take into account all the circumstances of the case before deciding whether a private warning is appropriate.

Generally, we would expect to use private warnings in the context of Authorised Person, Recognised Bodies and Approved Persons. However, we may also issue private warnings in circumstances where the persons involved may not necessarily be authorised or approved, including, for example, in potential cases of Market Abuse.

## **5.12 Injunctions and orders**

- 5.12.1 We have a broad power to make an application to the ADGM Court for injunctive relief and other orders (see FSMR, sections 236 - 238). The ADGM Court may make one or more of the following orders:

- (a) an order restraining a person that is engaging in conduct that would constitute a contravention;
- (b) an order requiring a person to do an act or thing to remedy a contravention or to minimise loss or damage; or
- (c) any other order as the Court sees fit, including an order restraining the transfer of assets or the departure of individuals from the jurisdiction of the court.

- 5.12.2 In deciding whether an application for an injunction is appropriate, we will consider all relevant circumstances including:

- (a) the nature and seriousness of the contravention;
- (b) whether the contravention is on-going;
- (c) whether the contravention affects, or has the potential to affect, our objectives;
- (d) where we consider it necessary to protect regulated entities and clients in the ADGM;



- (e) whether there is a danger of assets being dissipated or removed from the jurisdiction of the Court;
- (f) whether there is a danger that a person or persons may leave the jurisdiction and, if so, the effect that his or their absence may have on the effectiveness of the court's orders;
- (g) costs we would incur in applying for and enforcing an injunction and the likely effectiveness of such an injunction or other order;
- (h) the disciplinary record and compliance history of the person;
- (i) whether the losses suffered are substantial;
- (j) whether the assets at risk are substantial;
- (k) whether the number of clients at risk is significant;
- (l) whether the conduct in question can be adequately addressed by other disciplinary measures;
- (m) the extent to which another law enforcement agency or Non-ADGM Financial Services Regulator can adequately address the matter in question; and
- (n) whether there is a reason to believe that the person who is the subject of the possible application is or has been involved in money laundering, terrorist financing or other form of financial crime or criminal conduct.

### **5.13 Actions for damages**

5.13.1 Section 242 of FSMR provides that where a person:

- (a) intentionally, recklessly or negligently commits a breach of duty, requirement, prohibition, obligation or responsibility imposed under the FSMR; or
- (b) commits fraud or other dishonest conduct in connection with the matter arising under the FSMR;

the person is liable to compensate any other person for any loss or damage caused to that other person as a result of such conduct.

5.13.2 Section 242 of FSMR gives us, and any aggrieved persons, broad powers to make application for recovery of damages where there has been an identified contravention of the FSMR or Rules administered by us. An aggrieved person may exercise rights provided under section 242 of FSMR independently of, or contemporaneously with, us.



5.13.3 In determining whether to commence proceedings, we will take into account all relevant circumstances, including:

- (a) the nature and seriousness of the suspected contravention;
- (b) whether the suspected contravention is on-going;
- (c) whether the contravention affects, or has the potential to affect, our objectives;
- (d) whether a party who may have suffered detriment as a result of the alleged contravention is able to take his own remedial action;
- (e) in circumstances where more than one person has suffered loss or damage:
  - (i) the number of those that have suffered loss or damage and the amount of loss or damage involved; and
  - (ii) whether it is convenient or possible for a class of aggrieved persons to commence a proceeding;
- (f) the cost we would incur in applying for or enforcing any order that it is successful in obtaining;
- (g) whether the conduct in question can be adequately addressed by the use of other regulatory powers;
- (h) whether redress is available elsewhere or through another Non-ADGM Financial Services Regulator;
- (i) whether there is a reason to believe that the person is or has been, involved in money laundering, terrorist financing or other form of financial crime or criminal conduct;
- (j) whether the profits are quantifiable;
- (k) whether the person is solvent; and
- (l) whether we have a reasonable prospect of success in the relevant proceedings.

#### **Determining the amount of restitution**

5.13.4 In determining the amount of compensation payable in accordance with section 241 of FSMR, we may obtain information relating to the amount of profits made and/or losses or any other adverse effects resulting from the conduct of Authorised Person, Recognised Bodies or unauthorised persons.



5.13.5 As well as obtaining information through the use of our information gathering powers, we may consider using our powers under section 203 of FSMR to require an Authorised Person or Recognised Body to provide a report prepared by a Skilled Person, or appoint a Skilled Person ourselves to prepare a report. A Skilled Person's report may be requested to assist us to determine:

- (a) the amount of profits which have been made by the Authorised Person or Recognised Body;
- (b) whether the conduct of the Authorised Person or Recognised Body has caused any losses or other adverse effects to persons and/or the extent of such losses; or
- (c) how any amounts to be paid by the Authorised Person or Recognised Body are to be distributed between persons.

#### **5.14 The compulsory winding-up of a regulated entity**

5.14.1 We may apply to the ADGM Court for the winding up of a company which is, or has been, an Authorised Person or Recognised Body, or operating in breach of the General Prohibition, where we consider it is just and equitable and in the interests of the ADGM, in accordance with section 244 of FSMR.

5.14.2 In deciding whether such an application is just and equitable and is in the interests of the ADGM, we will consider all relevant circumstances, including:

- (a) whether the company has operated in accordance with the FSMR and Rules;
- (b) where the company has contravened the FSMR or Rules:
  - (i) the nature, scale and seriousness of the contravention;
  - (ii) whether the contravention is on-going;
  - (iii) whether the contravention affects, or has the potential to affect, our objectives;
  - (iv) what other steps the person could take or other orders a court could make to remedy the contravention;
- (c) the need to protect a firm's clients, particularly in cases where an Authorised Person holds or controls Client Assets;
- (d) whether the needs of those operating in the ADGM and the interests of the ADGM are best served by the company ceasing to operate;
- (e) in the case of an Authorised Person, where we consider that our Financial Services Permission should be withdrawn or, where it has been withdrawn, the



extent to which there is other business that the firm carries on without authorisation;

- (f) whether there is reason to believe that the firm or person is or has been involved in money laundering, terrorist financing or other form of financial crime or other criminal conduct;
- (g) where there is a significant cross-border or international element to the business being carried on by the company, the impact on the business in other jurisdictions and whether another law enforcement agency or Non-ADGM Financial Services Regulator can adequately address the matter; or
- (h) the extent to which the firm or person company has co-operated with us.

## **5.15 Injunctions and restitution orders in cases of market abuse**

5.15.1 Sections 238 and 240 of FSMR provide that the ADGM Court, on application by us, may make one of a range of orders in relation to a person, irrespective of whether a contravention has occurred, if it is satisfied that it is in the interests of the ADGM for such an order to be made.

5.15.2 We may seek a range of orders from the ADGM Court, including:

- (a) an order requiring that trading in any Investments cease, either permanently or for such period as is specified in the order;
- (b) an order requiring that a disclosure be made to the market;
- (c) an order prohibiting a person from making offers of Securities in or from the ADGM; or
- (d) an order prohibiting a person from being involved in Reporting Entities, Listed Funds or Securities within the ADGM.

5.15.3 Before we make an application for an order (whether interim, ex parte or final), we must be satisfied that such an order would be in the interests of the ADGM and will take into account all relevant circumstances, including:

- (a) the nature and extent of the conduct or any other matters in question;
- (b) the effect of the conduct on the market and our objectives;
- (c) whether the market is informed of all material information;
- (d) what steps the relevant person has taken in respect of the conduct or any other matters being considered;
- (e) what other form of relief (if any) is available to us; and



- (f) whether the conduct in question could have a significant impact on the integrity of, or confidence in, the ADGM.

## **5.16 Intervention power**

- 5.16.1 We may intervene as a party in any proceeding in the ADGM Court where we consider such intervention appropriate to meet our objectives (section 243 of FSMR). Where we intervene, it shall be subject to any other law, and have all the rights, duties and liabilities of such a party.
- 5.16.2 This provision does not affect our ability to seek leave to appear in proceedings as Amicus Curiae (i.e. someone not a party to the case, who volunteers to offer information to assist a court in deciding a matter before it, to make submissions on an issue of significance to the ADGM, or to place material before the Court that may otherwise not be available).
- 5.16.3 We will generally only exercise this right of intervention where we form the view that we will not be able to meet our objectives by simply appearing as Amicus Curiae and that, to serve the interests of the ADGM fully, it is necessary to join the proceeding as a party and stay involved in the matter throughout.

## **5.17 Settlement guidance**

- 5.17.1 A settlement is a resolution, between us and a person who is subject to potential enforcement action, to agree an outcome resulting from an investigation. A person who is or may be the subject of any form of enforcement action arising out of, or during the course of, an investigation may enter into settlement discussions with us. The possibility of a settlement does not, however, change the fact that enforcement action is, and continues to be, one of the tools available to us to secure our objectives under section 1(3) of the FSMR.
- 5.17.2 We generally consider that early settlement of an investigation advances our objectives in that it may result in, for example, consumers obtaining compensation sooner, the saving of our and industry resources and the promotion of good business and regulatory practices.
- 5.17.3 However, we will only consider settlement when we are confident we have sufficient understanding of the nature and gravity of the suspected misconduct to make a reasonable assessment of the appropriate outcome.
- 5.17.4 We will conduct all settlement discussions on a "without prejudice" basis; namely, that no party to the discussions may subsequently rely upon any admissions or statements made during the course of the settlement discussion or on any document recording those discussions.
- 5.17.5 We will only settle when the agreed terms result in what we consider to be an appropriate and proportionate regulatory outcome.



5.17.6 In the interests of efficiency and effectiveness, we will set clear and reasonable timetables for settlement discussions to ensure they do not unreasonably delay settlement or a regulatory or enforcement outcome. Where we have concerns that a party to settlement discussions is using negotiations as a means to delay or frustrate us with no genuine intention to settle, we, having made our concerns known to the other party, may bring the settlement discussions to an end and pursue other appropriate enforcement action.

5.17.7 Settlement in particular circumstances should not be regarded as binding precedent for future settlement discussions. Whilst we recognise the importance of consistency in its decision-making, we recognise that the facts of two enforcement cases are seldom identical. For this reason, and to ensure that we are able to respond to the demands of a changing and principles-based regulatory environment, it is important for us to be able to take a different view to that taken in an earlier case. However, any decision to depart from the earlier approach will only be made after careful consideration of the reasons for doing so.

#### **Factors we will consider when contemplating settlement**

5.17.8 In deciding whether a proposed settlement is acceptable, and in accordance with meeting our objectives, we will consider a number of factors, including:

- (a) the nature and seriousness of the conduct or suspected contravention the subject of the proposed settlement;
- (b) whether the suspected contravention is continuing;
- (c) whether the person is prepared to publicly acknowledge our concerns about the conduct or suspected contravention that is the subject of the proposed settlement;
- (d) the necessity for protective or corrective action;
- (e) the prospects for a swift resolution of the matter;
- (f) whether the suspected contravention that is the subject of the proposed settlement was:
  - (i) inadvertent; or
  - (ii) the result of the conduct of one or more individual officers or employees of the Authorised Person (and their level of seniority);
- (g) whether the person has co-operated with us (e.g. by providing complete information about the conduct or suspected contravention, taking any remedial action);



- (h) whether the settlement will achieve an effective outcome for those who have been adversely affected by the suspected contravention;
- (i) whether the person is likely to comply with the terms of the settlement;
- (j) the person's disciplinary record and compliance history; and
- (k) whether the settlement promotes general deterrence.

### **Form of settlement**

5.17.9 We will generally only settle an enforcement matter on the basis of either:

- (a) a Final Notice setting out the action taken (see paragraph 5.17.10); and/or
- (b) an Enforceable Undertaking (see paragraph 5.17.11).

A settlement which results in a notice of decision will be documented in the form of a legally enforceable agreement executed by all parties to the settlement.

### **Final Notice**

5.17.10 The outcome of a settlement with us may result in a Final Notice (in accordance with section 251 of FSMR), which promotes consistency of regulatory outcomes and transparency of approach to enforcement decision-making.

### **Enforceable Undertakings**

5.17.11 An Enforceable Undertaking ("EU") is a form of settlement that we may accept, under section 235 of FSMR as an alternative to other remedies available to us to influence behaviour and encourage a culture of compliance.

5.17.12 An EU involves a written undertaking from a person against whom action could be taken under the FSMR or any Rules made under the FSMR, to do or refrain from doing a specified act or acts. It may, amongst other things, include remedial actions that are not otherwise available under a notice of decision.

5.17.13 An EU may be offered by a person and accepted by us at any time, either before, during or after an investigation, the making of a decision or the commencement of proceedings in the court. Entry into an EU is voluntary. We do not have the power to require a person to enter into an EU, nor can a person compel us to accept an EU.

5.17.14 We will generally only consider accepting an EU that we consider to be necessary or desirable in pursuit of our objectives and where the EU contains:

- (a) an admission or acknowledgement of any contraventions or our concerns;
- (b) undertakings addressing our concerns; and



- (c) an agreement to make the EU public, and
- (d) an agreement not to make public statements conflicting with the spirit of the EU.

5.17.15 A person offering us an EU may also undertake in the EU to pay a pecuniary penalty and/or our costs, including any costs associated with compliance with the EU.

#### **Variation or withdrawal**

5.17.16 Once accepted by us, an EU can only be withdrawn or varied with our consent in writing. We will only consider a request to vary an undertaking if:

- (a) the variation will not alter the spirit of the original undertaking;
- (b) compliance with any one or more terms of the undertaking is subsequently found to be impractical or impossible; or
- (c) there has been a material change in the circumstances which led to the undertaking being given.

#### **Compliance with an EU or decision**

5.17.17 If we consider that a person has not complied with a term of the EU or a decision, we may:

- (a) apply to the ADGM Court for appropriate orders;
- (b) publish the fact of the application to the ADGM Court and any subsequent orders of the court; and
- (c) seek the costs of the application.

### **5.18 Costs Litigation**

#### **Costs**

5.18.1 We will generally seek litigation costs orders from the ADGM Court where we have commenced a proceeding and been successful in achieving all or part of the outcome sought.

#### **Costs in proceedings before the ADGM Appeals Panel**

5.18.2 The ADGM Appeals Panel, on conclusion of any proceedings before it, may make an order (under section 229(2)€ of the FSMR) requiring a party to the appeal to pay a specified amount, being all or part of the costs of the proceedings, including those of any party to the proceedings.



## **Investigation Costs**

5.18.3 Where a person is found by the Court to have contravened the FSMR or Rules, the ADGM Court may order that person to pay or reimburse us in respect of the whole or a specified part of the costs and expenses of the investigation, including the remuneration of a Person involved in the investigation.

## **5.19 Step 5 - Conclusion of an investigation**

5.19.1 We will conclude an investigation when:

- (a) we have decided to take no further action in response to the suspected contraventions which are the subject of the investigation (due to, for example, insufficiency of evidence); or
- (b) all remedies and obligations resulting from an investigation are concluded and fulfilled.

## **5.20 Publicity**

### **Publicity of enforcement actions**

5.20.1 We will generally publish, in a manner we consider appropriate and proportionate, information and statements relating to enforcement actions, including public censures and any other relevant matters. The publication of enforcement outcomes is consistent with our commitment to open and transparent processes and our objectives.

5.20.2 In all cases we retain the discretion to take a different course of action, where it furthers our ability to achieve our objectives or is otherwise in the public interest to do so. For example, if we issue a private warning, rather than taking formal action, we may decide not to publish this if it furthers our ability to achieve our objectives. Please refer to paragraph 5.11 for further details about how we use private warnings.

### **Commencement and conclusion of investigations**

5.20.3 We will generally not publish information about the commencement, conduct or conclusion of the investigative phase of our enforcement actions.

5.20.4 Where we do publish the fact that we are conducting an investigation and no enforcement action results, we may issue a press release confirming the conclusion of the investigation and that no action is to be taken.

### **Commencement of proceedings**

5.20.5 We expect to publish information about the commencement or hearing of enforcement proceedings, unless otherwise required not to by the relevant body or it is not in the public interest to do so and would not achieve our objectives.



## **Disclosure of decisions**

### **5.21 Executive Decisions**

5.21.1 We will generally make public any enforcement administrative decision made by our Executive and will do so in a timely manner after any relevant period to institute a referral of the decision to the ADGM Regulatory Committee has expired or appeal process has come to an end, unless it is not in the public interest to do so and would not achieve our objectives.

### **The Regulatory Committee's Decisions**

5.21.2 We will generally make public any decision made by the ADGM Regulatory Committee and will do so in a timely manner after any relevant period to institute a referral of the decision to the ADGM Appeals Panel has expired or appeal process has come to an end, unless otherwise required not to by the ADGM Regulatory Committee, or it is not in the public interest to do so and would not achieve our objectives.

### **Appeals Panel or Court Decisions**

5.21.3 FSMR requires all ADGM Appeals Panel hearings to be heard in public unless the Appeals Panel orders otherwise or its rules of procedure provide otherwise. The Appeals Panel may exercise its discretion not to make public any decisions it may make. Where it does determine to publish a decision or interim decision, the Appeals Panel will publish these on its website.

5.21.4 Following hearings and decisions by the ADGM Appeals Panel, we expect to make timely public disclosure of the Appeals Panel's decisions, including any interim decisions, unless otherwise ordered.

5.21.5 Decisions made by the ADGM Courts will be publicised by us in a timely manner, unless ordered otherwise.

5.21.6 This approach is adopted on the basis that any delay in disclosure may hinder and unfairly prejudice us in achieving some of our primary objectives. For example, non-disclosure may potentially prejudice users and prospective users of financial services in the ADGM if they are acting unaware of facts known in the enforcement action.

### **Disclosure of settled enforcement actions**

5.21.7 We expect to disclose publicly the outcome of any settlement of an enforcement action, including the notice of decision or EU, to ensure all stakeholders and the general public are clearly informed of the outcome.

5.21.8 Settlement agreements which result in a Final Notice or an EU will result in the publication of the relevant notice of decision or EU on our website as well as an associated press release.

5.21.9 We may be ordered, or required by law, not to publish information regarding a settlement. For example, disclosure may not occur if a third party has commenced proceedings in the courts in respect of the same conduct and the publication of the undertaking or settlement may prejudice that party's case in the courts. However, simply because a third party has commenced proceedings does not preclude us from publishing our settlements, including the notice of decision or EU.

#### **Content and mode of publication**

5.21.10 Where appropriate, we may comment publicly on investigations, enforcement actions and other formal regulatory decisions publishing final notices of regulatory decision, EUs or other enforcement actions. In doing so, we will take into account:

- (a) any privileged or sensitive information when considering the content of our publications; and
- (b) the possibility that any publication may potentially affect the rights of a third party and, if so, will endeavour to give that third party notification of the publication and an opportunity to make representations on the publication.

5.21.11 Publication may take any one or more forms including a media release, a statement on our website or any other forums as determined suitable by us.