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Dear James

## **CP12/35\*\*\* The FCA's use of temporary product intervention rules**

This is the Financial Services Consumer Panel's response to CP12/35\*\*\* The FCA's use of temporary product intervention rules.

### **Overview**

We support the addition of temporary product intervention rules to the FCA's regulatory toolkit and we think the draft policy statement sets out a measured and appropriate approach.

The Paper raises important questions about the protection of consumers who might already own a product that becomes subject to a temporary intervention rule. We would like to see firms that had sold the products being required to contact existing customers to advise them of the intervention, and to provide factual information to help them decide on what action they should take. We think there will also be a need for the FCA to take steps to protect consumers from undue pressure by claims management companies, which may seek to exploit the opportunity provided by the introduction of temporary rules. The options available to consumers for making complaints and/or claims should be one of the key messages delivered by the FCA whenever it exercises its temporary product intervention powers.

Although it is encouraging to see that the FCA intends to have due regard to how any proposed rules fit within the wider EU legislative framework, it is not clear how it intends to do this in practice. The ESAs have indicated that they wish to have, and use, wider product intervention powers. In its 2013-15 workplan<sup>1</sup> ESMA has stated that it intends to 'strengthen [its] role in product intervention under MiFID (and possibly other sectors / legislations)'. Article 31 of the proposed MiFIR regulations allows ESMA to intervene to restrict a particular financial instrument or activity on a temporary basis, provided that no national regulator has already intervened.

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<sup>1</sup> [http://www.esma.europa.eu/system/files/2012-632\\_0.pdf](http://www.esma.europa.eu/system/files/2012-632_0.pdf)

Additionally, Gabriel Bernardino has emphasised ‘the necessity for EIOPA to have a power to issue temporary prohibitions and restrictions of those financial activities that might threaten the orderly functioning or stability of financial markets’<sup>2</sup>. The Panel would welcome the FCA’s views on whether communications channels with the ESAs are sufficiently robust that any action would be taken at national level before intervention of the ESAs is required.

***Q1: Do you agree with our analysis of some of the circumstances in which temporary product intervention rules might be necessary?***

Yes, we agree. The broad scenarios set out in CP12/35\*\*\* seem to cover most of the circumstances in which the temporary product intervention rules might be used. We agree with the FSA that it would be inappropriate, if not impossible, to set out a definitive list. Appropriate provision will have to be made however for products such as some property funds, where there are entirely legitimate restrictions on switching and transfer.

***Q2: In what other circumstances might it be necessary to make temporary product intervention rules?***

We would add insurance products where the percentage of successful claims is below the industry norm, as well as products or product features that on a common sense basis could involve a breach of the Principle of Treating Customers Fairly – for example, by being poor value for money.

***Q3: Will our proposed approach create an appropriate level of awareness amongst firms affected by temporary product intervention rules?***

Given the circumstances in which the rules are likely to be used it seems appropriate for the FCA website to be the principal means of communication with firms. As is noted in the Paper, use of the rules may well generate a degree of wider publicity that will also alert firms to the FCA action.

***Q4: How should the FCA balance the need for clarity and awareness in the market against the likely need for urgent action when making temporary product intervention rules?***

In view of the urgency we suggest that the use of the FCA website and a range of communications media (including print and social media) will be appropriate.

***Q5: How can the FCA best protect consumers who hold products which might be affected by temporary product intervention rules?***

We would expect such circumstances to arise where, for instance, the market for a product covered by a temporary intervention rule would become immediately illiquid and/or make the product almost worthless. We suggest it would be worth reviewing the impact of the FSA’s action on Traded Life Policy Investments with a view to

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<sup>2</sup> Speech to the EIOPA Consumer Day. Frankfurt, 6<sup>th</sup> December 2012

identifying how more could be done to inform existing investors about issues relating to the product and where to obtain further information – perhaps a factsheet could be provided to the Money Advice Service and other groups such as Citizens Advice about the product and the reasons for the intervention. It would also be worth reviewing ESMA's investor warnings, such as the FOREX warning ESMA/2011/412 of 5 December 2011, at [www.esma.europa.eu](http://www.esma.europa.eu).

The draft policy statement makes it clear that any unenforceability provisions will not cover existing investors/product holders, although of course other existing protections such as access to the Financial Ombudsman Service, would apply. We would like to see firms that had already sold the products in question being required to contact existing customers to advise them of the intervention and to provide factual information about taking steps to consider whether the product met and continues to meet their needs. This would almost certainly include contacting the firm to discuss the sale.

In cases where there is a possibility of compensation being available to consumers we would like the FCA to take pragmatic steps to mitigate the particular risk of claims management companies placing undue pressure on consumers. The way in which claims/complaints will be dealt with should be an important feature of key messages published whenever the FCA uses its temporary product intervention powers. Perhaps copies of a version of the joint Ministry of Justice/FSA/FOS/FSCS leaflet on Claims Management Companies and Financial Services Complaints, could be sent to affected consumers.

***Q6: Do you agree with our analysis of how temporary product intervention rules might impact upon innovation and market entry?***

Yes, we agree. It will be necessary for the FCA to monitor actively the impact of the product intervention rules, and to ensure that those charged with exercising this power are able to recognise genuinely 'innovative' products that do in fact meet consumer needs.

***Q7: What issues should we consider in relation to how this Statement of Policy affects equality and diversity?***

There is no reason why this power should adversely affect equality and diversity principles, if used appropriately.

Yours sincerely

Adam Phillips  
Chair  
Financial Services Consumer Panel