

CP13/8^{***}

Financial Services Authority

Publishing information about enforcement warning notices

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The Financial Services Authority invites comments on this Consultation Paper. Comments should reach us by 18 June 2013.

Comments may be sent by electronic submission using the form on the FSA's website at: www.fsa.gov.uk/Pages/Library/Policy/CP/2013/cp13-08-response.shtml.

Alternatively, please send comments in writing to:

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It is the FSA's policy to make all responses to formal consultation available for public inspection unless the respondent requests otherwise. A standard confidentiality statement in an email message will not be regarded as a request for non-disclosure.

Despite this, we may be asked to disclose a confidential response under the Freedom of Information Act 2000. We may consult you if we receive such a request. Any decision we make not to disclose the response is reviewable by the Information Commissioner and the Information Rights Tribunal.

Copies of this Consultation Paper are available to download from our website – www.fsa.gov.uk. Alternatively, paper copies can be obtained by calling the FSA order line: 0845 608 2372.

Abbreviations used in this paper

CP	Consultation Paper
DEPP	The Decision Procedure and Penalties Manual
EG	The Enforcement Guide
FCA	Financial Conduct Authority
FSA	Financial Services Authority
FSMA	Financial Services and Markets Act 2000
LCO	Legal Cutover (1 April 2013)
PRA	Prudential Regulation Authority
The 2012 Act	Financial Services Act 2012

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Overview

- 1.1 This consultation paper (CP) sets out our proposals on the FCA's use of the new power under s391(1)(c) of the Financial Services and Markets Act 2000 (FSMA) to publish such information about the matter to which a warning notice relates as it considers appropriate.
- 1.2 The principal purpose of the new power is to promote early transparency of enforcement proceedings. The financial services industry and consumers will be able to understand the types of behaviour that the FCA considers unacceptable at an earlier stage.
- 1.3 As the FSA's Enforcement Guide (EG) will be adopted by the FCA we propose to amend EG 6 (Publicity) to explain when, and how, the FCA will exercise the power.
- 1.4 The power only applies to warning notices listed under section 391(1ZB). These are disciplinary outcomes, i.e. where we are proposing to censure, fine or suspend a firm or individual. The power does not apply to non-disciplinary outcomes.
- 1.5 The FCA will publish information about the warning notice in a statement. This statement will, among other things, make it clear that the warning notice is not the final decision of the FCA. We have set out two illustrations of warning notice statements at the end of the following chapter.
- 1.6 Our proposed policy is that the FCA will normally publish a statement where it has issued a warning notice to which the power applies. However, the FCA must not publish a statement if publication would be unfair to the person to whom the notice relates, prejudicial to the interests of consumers or detrimental to the stability of the UK financial system. We explain in greater detail how the FCA will assess whether publication would be unfair in the following chapter.
- 1.7 The FCA will not use the power under section 391(1)(c) until this consultation has ended and a policy on the use of the power is included in EG.

Structure of this Consultation Paper

- 1.8** In CP12/37 we consulted on, amongst other matters, the statement of procedure that the FCA proposes to follow when deciding whether to publish information about the matter to which a warning notice relates (required by section 395(1)(d) FSMA). In particular we proposed that decisions to publish information about a warning notice should be taken on behalf of the FCA by the Regulatory Decisions Committee (RDC). The consultation period closed on 1 February 2013.
- 1.9** In CP13/6 we consulted on proposed amendments to the existing FSA Enforcement Guide (EG) to create the new FCA Enforcement Guide. These changes reflect new powers (other than the warning notice publicity power) being introduced by the 2012 Act as well as the creation of a new regulatory structure. The consultation period closed on 1 March 2013.
- 1.10** A Policy Statement summarising the feedback received to both CPs and our response to that feedback will be published on 25 March 2013.
- 1.11** In Chapter 2 of this CP we explain our policy proposals for how the FCA will use the power under section 391(1)(c) FSMA to publish information about the matter to which a warning notice relates. We propose that this new policy will be included in Chapter 6 of EG alongside our existing policies for publishing other statutory notices.

Timetable and next steps

- 1.12** Comments on this CP should reach us by **18 June 2013**. We will review all responses, and final rule instruments and a Policy Statement will be issued by the FCA.
- 1.13** The FCA will not use the power under section 391(1)(c) until this consultation has ended and a policy on the use of the power is included in EG.

Equality and diversity

- 1.14** We have considered whether equality and diversity issues arise from the proposals in this CP. We have concluded that the proposals do not give rise to discrimination and are of low relevance to the equality agenda.
- 1.15** We would welcome any comments respondents may have on any equality and diversity issues they believe arise from our proposals.

Who should read this Consultation Paper?

- 1.16** This paper should be read by all firms.

CONSUMERS

As these proposals concern the transparency of the FCA's enforcement process, they are likely to be of general interest to consumers.

2

Warning notice publicity policy

Introduction

- 2.1 In this chapter, we explain our proposed amendments to EG arising from the new power that the FCA will have to publish information about warning notices. The FCA will adopt EG at LCO.
- 2.2 The text of the proposed amendments is set out at Appendix 1.

Power to publish information about warning notices

- 2.3 The 2012 Act gives the FCA the power under amended FSMA section 391(1) to publish such information about the matter to which a warning notice relates as it considers appropriate.
- 2.4 Until 2010, the earliest that the FSA could publish details of a statutory notice in a disciplinary matter was when it issued a final notice at the conclusion of a case (either after the Tribunal has reached a decision or after the period for referring the matter to the Tribunal has expired). In 2010, the publication stage was brought forward to when the RDC issues a decision notice, i.e. after the firm/individual has made its representations to the RDC in response to the warning notice but before the Tribunal has made a decision. The Government has now given power to the regulators to publish at the earlier warning notice stage, albeit on a more restricted basis, i.e. unlike final and decision notices, which can be published in their entirety, they cannot publish whole warning notices.

- 2.5** The principal purpose of the power is to promote early transparency of enforcement proceedings. Its introduction marks a real departure from the previous regulatory regime and is a bold move towards more transparent and open regulation. Both the financial services industry and consumers will be able to understand the types of behaviour that the FCA considers unacceptable at an earlier stage, which in turn will strengthen the FCA's continuing enforcement strategy of credible deterrence.
- 2.6** The power only applies to the warning notices listed under section 391(1ZB). These are disciplinary outcomes, i.e. where a regulator is proposing to censure, fine or suspend a firm or individual. The power does not apply to non-disciplinary outcomes such as proposals to prohibit an individual, withdraw the approval of an individual, or cancel the permission of a firm. The power will enable a regulator to make public the fact that it has begun formal disciplinary proceedings against a firm or individual.
- 2.7** The regulators must consult those to whom the warning notice is given or copied before publishing any information.
- 2.8** Section 391(6) FSMA provides that the FCA 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.
- 2.9** Under section 395(1)(d), each regulator must determine the procedure that it proposes to follow when making decisions to publish information about the matter to which a warning notice relates. In CP12/37 we proposed that decisions to publish information about a warning notice should be taken on behalf of the FCA by the Regulatory Decisions Committee (RDC).

Summary of Enforcement Guide changes

- 2.10** As EG will be adopted by the FCA, we propose to amend EG 6 (Publicity) to explain when, and how, the FCA will exercise the power to publish details of a warning notice.

When we propose to publish information

- 2.11** As explained above, the principal purpose of this power introduced by the 2012 Act is to promote early transparency of enforcement proceedings. The 2012 Act also amends FSMA to introduce a new regulatory principle that the regulators should exercise their functions as transparently as possible. In line with this regulatory principle, our proposed policy is that the FCA will consider the relevant circumstances of each case but will normally publish a statement where it has issued a warning notice to which the power

applies. In considering the relevant circumstances of each case, the FCA will not publish information if publication would, in its opinion:

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

2.12 In deciding whether publication would be unfair, the FCA will consider, amongst other matters, whether the person to whom the action was proposed to be taken, is a firm or an individual. The FCA will also consider the extent to which the person has been made aware of the case against him during the course of the investigation. A warning notice is only issued after Enforcement has carried out an investigation which may have taken months or, in some cases, over a year.

What we propose to publish

2.13 The FCA will publish the information about the warning notice in a statement. This will normally contain sufficient information to identify the firm or individual which is subject to the enforcement action as well as sufficient information to enable consumers, firms and market users to understand the nature of the FCA's concerns. We have set out two illustrations of warning notice statements at the end of this Chapter showing the level of information that we propose to publish.

2.14 The published information would not normally contain details of the sanction proposed in the warning notice. As the FCA will only be able to publish details of disciplinary matters, it would not be able to publish that it is, for example, proposing to prohibit an individual as well as fine them. We therefore propose that the FCA will publish the fact it is taking action without specifying, say, the level of fine as this would not give a complete picture of the sanctions sought in all cases. It is also likely that publishing the proposed level of penalty will lead to speculation or comment about the seriousness of the failings which, without context, may be seen to be unfair.

How we propose to consider whether publication would be unfair

2.15 If the FCA intends to publish a warning notice statement, it will consult the persons to whom the notice is given or copied. We have already consulted in CP12/37 on the process that we propose the FCA should follow in deciding whether to publish, including how it will consult with the persons to whom the notice is given or copied. This process will be included in DEPP 3. A Policy Statement summarising the feedback received to our proposals and our response to that feedback will be published on 25 March 2013.

- 2.16** The FCA will consider any response but will normally not decide against publishing a warning notice statement on the grounds of unfairness solely because it is claimed that publication could have a negative impact on a person's reputation (given this is an inevitable consequence of publication). A person to whom the warning notice is given or copied who seeks to demonstrate potential unfairness from publication must provide clear and convincing evidence of how that unfairness may arise and how they could suffer a disproportionate level of damage.
- 2.17** We have set out in our proposed policy the main circumstances in which we consider that the FCA would not publish details of a warning notice on the grounds that publication would be unfair to the person with respect to whom the action was proposed to be taken. They would need to demonstrate that publication could materially affect their health, result in a disproportionate loss of income or livelihood, prejudice criminal proceedings to which they are a party or give rise to some other equal degree of harm.
- 2.18** The following scenarios cover what we consider to be the more obvious instances of unfairness. One scenario where the FCA may decide not to publish information is where the subject can demonstrate that his/her physical or mental health would be adversely affected by the publication of information. The decision may be less straightforward where for example the physical or mental health of a close family member of the subject would be adversely affected (e.g. from press intrusion). For example:

We have issued a warning notice to a senior manager of a bank for failing to exercise due skill, care and diligence in managing the business of the firm for which he is responsible. He suffers from a long-term physical illness that he states will significantly deteriorate if details of the warning notice are published. He already has a report from his consultant to support his claim. He also says that his wife is suffering from depression and her condition may become worse if there is publicity. Lastly, he claims that his children have been made fun of at school following earlier press commentary about his conduct at the bank and this is likely to be repeated if details of the warning notice are published.

- 2.19** In this case, the FCA would probably not publish information if the senior manager had clear and convincing evidence that his illness would seriously deteriorate. Similarly, the FCA would probably not publish information if there was clear and convincing evidence that the health of a direct family member would also be affected. The FCA would probably publish information if the only grounds advanced were media intrusion.
- 2.20** In addition, an individual or a firm could argue that publication would cause a loss of custom which in turn would lead to bankruptcy or insolvency. For example:

We have issued a warning notice to a small IFA for failing to put in place adequate systems and controls over its sales process in respect of high risk investment products. The firm claims that if details of the warning notice are published, many of its existing customers will take their business to competitor firms and it will have difficulty attracting new business if there is adverse coverage of the firm in the media. This would lead to staff

redundancies. The IFA is also able to produce some evidence to show that the reduction in business is likely to reach a certain level, at which point the firm will become insolvent.

- 2.21 In this case, the FCA would probably not publish information if there is clear and convincing evidence of likely insolvency as this would amount to disproportionate harm. Similarly, the FCA would probably not publish if there is clear evidence that staff are likely to be made redundant although the firm would need to demonstrate that redundancies would be caused by the publicity rather than any other factors.
- 2.22 Likewise, a subject may also argue against publication on the grounds of potential loss of livelihood, e.g. an individual would lose his/her job at the firm that employs him/her. For example:
- We have issued a warning notice to a manager for failing to observe proper standards of market conduct in carrying out her controlled function. The firm for which she works has supported her throughout the course of the investigation, but she claims that she is likely to be dismissed if details of the warning notice are published. She also claims that even if the FCA decides to drop the case at a later stage, her career prospects will nonetheless have been irrevocably damaged.*
- 2.23 In most cases, an employer will already have decided during the course of an FCA investigation whether to support the employee or take independent disciplinary action against its employee, so in the above scenario the FCA would probably publish information. If the proceedings are subsequently discontinued, any harm caused in the interim is adequately remedied by publishing a notice of discontinuance.
- 2.24 Further, we propose that the policy should also make clear that arguments made solely on the basis that it is unfair to publish information at this point of the enforcement process will not affect the FCA's decision. Similarly, arguments about the merits of the warning notice itself will not be material to publication decisions. The purpose of the consultation is to give the subject of the warning notice an opportunity to comment on whether it is appropriate to publish information regarding the warning notice. The subject of the warning notice will be able in due course to make separate representations on the substance of the matters in the warning notice.

How we propose to publish information

- 2.25 If, having considered any responses from the subject, the FCA publishes a statement, the statement will make clear that (a) the warning notice is not the final decision of the FCA; (b) the recipient has the right to make representations to the RDC which, in light of those representations, will decide on the appropriate action and whether to issue a decision notice; and (c) if a decision notice is issued, the subject of the notice will have the right to refer the matter to the Upper Tribunal, which would reach an independent decision on the appropriate action for the FCA to take. We have also included statements to this effect in the examples of warning notice statements at the end of this Chapter.

- 2.26 In cases where the FCA publishes a warning notice statement and the FCA subsequently decides not to take any further action, the FCA will make it clear on its website that the warning notice no longer applies. The FCA will normally do this by publishing a notice of discontinuation, with the consent of the persons to whom the notice has been given or copied.

Illustrations of warning notice statements

Example 1 – where a warning notice has been issued to a firm

The Financial Conduct Authority (the FCA) gave [name of firm] of [address], (Firm Reference Number: [-----]) a warning notice on 1 September 2013 proposing to take action in respect of the conduct summarised in this statement.

IMPORTANT: a warning notice is not the final decision of the FCA. Having received the warning notice, [name of firm] has the right to make representations to the Regulatory Decisions Committee (RDC) which, in the light of those representations, will decide on the appropriate action and whether to issue a decision notice. The RDC is a Committee of the FCA board which decides whether the FCA should give certain statutory notices described as within its scope by the FCA's Handbook.

If a decision notice is issued, [name of firm] has the right to refer the matter to the Upper Tribunal which would reach an independent decision on the appropriate action for the FCA to take, if any.

If either the RDC or the Upper Tribunal decide that no further action should be taken, the FCA will publish a discontinuation notice provided it has [name of firm]'s consent.

The following is a summary of the warning notice which sets out the action that the FCA proposes to take:

- One of the FCA's operational objectives is securing an appropriate degree of protection for consumers. Firms must take reasonable care to ensure that they provide advice which is suitable for a customer's individual needs and circumstances. In order to do this, firms must have adequate systems and controls in place.
- The FCA considers that during the period from 1 January 2007 to 31 December 2009 (the Relevant Period) [name of firm] breached Principle 3 of the FCA's Principles for Businesses by failing to take reasonable care to establish and maintain effective systems and controls in respect of the suitability of its advice regarding the sale of [name of product] to its customers.

- In particular, the FCA considers that, during the Relevant Period, [name of firm]:
 - 1) failed to have in place adequate systems and controls in respect of the determination of its customers' attitudes to risk;
 - 2) failed to take reasonable care to adequately record that the [name of product] it recommended to its customers were suitable;
 - 3) did not effectively monitor its staff to ensure that they took reasonable care to ensure the suitability of their advice.
- The FCA considers that, as a result of the above failings, [name of firm]'s customers were exposed to an unacceptable risk of being sold [name of product] which was unsuitable for them.

Example 2 – where a warning notice has been issued to an individual

The Financial Conduct Authority (the FCA) gave [name of individual] of [address], (Reference Number: [-----]) a warning notice on 1 September 2013 proposing to take action in respect of the conduct summarised in this statement.

IMPORTANT: a warning notice is not the final decision of the FCA. [name of individual] has the right to make representations to the Regulatory Decisions Committee (RDC) which, in the light of those representations, will decide on the appropriate action and whether to issue a decision notice. The RDC is a Committee of the FCA board which decides whether the FCA should give certain statutory notices described as within its scope by the FCA's Handbook.

If a decision notice is issued, [name of individual] has the right to refer the matter to the Upper Tribunal which would reach an independent decision on the appropriate action for the FCA to take, if any.

If either the RDC or the Upper Tribunal decide that no further action should be taken, the FCA will publish a discontinuation notice provided it has [name of individual]'s consent.

The following is a summary of the warning notice which sets out the action that the FCA proposes to take:

- The FCA considers that [name of individual] breached Principles 2 and 7 of the FCA's Statements of Principle for Approved Persons when carrying out his controlled functions in connection with [name of firm]'s investment business between January 2007 and December 2009 (the Relevant Period).

- In particular, the FCA considers that, during the Relevant Period, [name of individual]:
 - while acting as an adviser (CF30), failed to act with due skill, care and diligence and did not take adequate steps to ensure that he had: obtained and recorded sufficient financial and personal information about his customers to assess the suitability of his recommendations; adequately assessed and established his customers' attitude to risk; or adequately explained why his recommendations were suitable with regard to his customers' personal and financial circumstances.
 - while acting as a senior manager (CF1), failed to take reasonable steps to ensure that [name of firm] had adequate compliance arrangements to ensure the suitability of its advice.
- The FCA considers that [name of individual]'s conduct demonstrates a failure to understand the importance of complying with regulatory requirements aimed at ensuring that customers received suitable advice.

Q1: Do you agree with our proposed policy for the publication of information relating to warning notices?

Annex 1

Cost benefit analysis

1. The changes we are proposing to make to EG in this CP arise from the new power to publish information about a warning notice under section 391(1) FSMA. The proposals for amending EG do not relate to rule changes or to guidance on rules but are instead concerned with the description of the FCA's approach to enforcement. While a CBA is therefore not required by FSMA, we have taken into account the likely impact of the use of the power on firms and consumers in our proposals as explained in the CP. For example, as explained above, the FCA will take into account the likelihood that publication could result in a disproportionate loss of income or livelihood when considering whether publication would be unfair to the person for whom the action was proposed to be taken.
2. We expect there may be a minimal increase in the operating costs of the RDC in making the additional decision whether to publish information in relation to a warning notice. These will include assessing the representations made to the RDC. We expect these costs will be of minimal significance.
3. Persons to whom the warning notice is given or copied will face two types of costs. Firstly, they may incur costs if they make representations to the RDC about publication of warning notices, especially if they instruct legal counsel to respond on their behalf. Secondly, they may face costs arising from publication as a result of damage to their reputation, such as loss of business.
4. The principal benefits that the use of the warning notice publicity power will bring is greater and earlier transparency to the FCA's enforcement process. It will allow firms and consumers an earlier insight into this part of the FCA's work. This additional information may help consumers make more informed decisions, but more likely may help other firms consider whether their conduct, or potential conduct, may be in breach of our rules sooner than is currently the case. As a result we may see greater compliance with our rules.

Annex 2

Compatibility statement

1. In this section we describe how our proposed policy for using the warning notice publicity power is compatible with the FCA's statutory objectives and duties. This section also outlines how our proposals are consistent with the proposed principles of good regulation (in section 3B FSMA) which the FCA must have regard to in discharging its general functions (under section 1B(5)(a) FSMA).

Compatibility with the FCA's statutory objectives

2. We believe that the proposed guidance in this CP is compatible with the FCA's strategic objective and advances all of its operational objectives under section 1B of FSMA. Our effective and appropriate use of enforcement powers plays an important part in pursuing our statutory objectives, as it increases compliance with rules by making market participants more aware of conduct that may breach these rules, and the potential for sanctions for such conduct. For example, publishing information about warning notices should make consumers aware at an earlier stage of the action we have taken. Further, the earlier publication of enforcement action by the FCA is likely to support the integrity objective by protecting and enhancing the integrity of the UK financial system.

Competition duty

3. So far as is compatible with its consumer protection or integrity objective, the FCA must discharge its general functions (including rule-making guidance and general policies) in a way that promotes effective competition in the interests of consumers (section 1B(4) of FSMA). In proposing the amendments to EG set out in this paper, we have had regard to this competition duty. Increased transparency will help to advance rules that increase competition in the interests of consumers and therefore we believe that we are discharging our general functions in a way which promotes effective competition in the interests of consumers.

Compatibility with the regulatory principles

4. We have had regard to the principles set out in section 3B FSMA. We believe the proposed changes are compatible with all these principles. In particular, in proposing the policy set out in Chapter 2 of this CP, we have had regard to the principle that a burden or restriction imposed on a person should be proportionate to the benefits. As the principal purpose of this power is to promote early transparency of enforcement proceedings, we have also had particular regard to the new regulatory principle that the regulators should exercise their functions as transparently as possible.

Annex 3

List of questions

- Q1:** Do you agree with our proposed policy for the publication of information relating to warning notices?

Appendix 1

Draft Handbook text

ENFORCEMENT GUIDE (AMENDMENT) INSTRUMENT 2013

Powers exercised by the Financial Conduct Authority

- A. The Financial Conduct Authority makes this instrument in the exercise of its power under section 139A (Power of the FCA to give guidance) and related provisions of the Financial Services and Markets Act 2000.

Commencement

- B. This instrument comes into force on [*date*].

Amendments to the Enforcement Guide

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

Citation

- E. This instrument may be cited as the Enforcement Guide (Amendment) Instrument 2013.

Made by order of the Board of the Financial Conduct Authority
[*date*]

Annex A

Amendments to the Enforcement Guide (EG)

6 Publicity

...

Publicity during, or upon the conclusion of regulatory action

- 6.7 For *supervisory notices* (as defined in section 395(13)) which have taken effect¹, *decision notices* and *final notices*, section 391 of the *Act* requires the ~~FSA~~ *FCA* to publish, in such manner as it considers appropriate, such information about the matter to which the notice relates as it considers appropriate. Section 391 prevents the *FCA* from publishing *warning notices*, but the *FCA* may publish such information about the matter to which a *warning notice* falling within section 391(1ZB) of the *Act* relates as it considers appropriate after consulting the *persons* to whom the notice is given or copied. However, section 391 provides that the ~~FSA~~ *FCA* cannot publish information if publication of it would, in its opinion, be unfair to the *person* with respect to whom the action was taken (or was proposed to be taken), or prejudicial to the interests of *consumers*, or detrimental to the stability of the UK financial system.

Warning notice statements

- 6.7A The *FCA* may publish information about *warning notices* which fall within section 391(1ZB) of the *Act*. These are essentially disciplinary *warning notices*, eg where the *FCA* is proposing to censure, fine, suspend or restrict a *firm* or individual. The power to publish information does not apply, for example, to *warning notices* which only propose to prohibit an individual, withdraw the approval of an individual or cancel the permission of a *firm*.
- 6.7B The decision whether to exercise the power to publish information about a *warning notice*, and if so what information to publish, will be taken by the *RDC* after it has consulted with the *persons* to whom the *warning notice* has been given or copied. The procedure the *FCA* will follow when deciding whether to publish information about a *warning notice* is set out in *DEPP* 3.
- 6.7C The principal purpose of this power is to promote the early transparency of enforcement proceedings. The *FCA* will consider the circumstances of each case but expects normally to publish information about the matter to which a *warning notice* falling within section 391(1ZB) of the *Act* relates, unless publication of that information would, in its opinion, 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*. In deciding whether publication would be unfair, the *FCA* will have regard to, amongst other matters,

¹ Section ~~55Y(2)~~ 53(2) and section 391(8) of the *Act* define when a variation of permission under a supervisory notice takes effect

whether the *person* with respect to whom the action was proposed to be taken is a *firm* or an individual and the extent to which the *person* has been made aware of the case against him during the course of the investigation.

6.7D The *FCA* will publish information in a statement (a *warning notice* statement) which will ordinarily include details of:

- (1) the name of the *firm* or individual;
- (2) additional information to enable the identification of the *firm* or individual (eg *FCA* Registration Number, address or date of birth);
- (3) in the case of an *approved person*, his or her employer; and
- (4) a brief summary of the facts which gave rise to the *warning notice* to enable *consumers, firms* and market users to understand the nature of the *FCA*'s concerns.

6.7E As the *FCA* may only publish information about disciplinary *warning notices* and not others, it will in many cases not be able to publish details of all of the sanctions it is seeking to impose (for example, the fact that it is proposing to prohibit an individual as well as impose a fine). For this reason, the *FCA* will not normally publish the nature and level of the proposed disciplinary sanctions.

6.7F If the *FCA* intends to publish a *warning notice* statement, it will consult the *persons* to whom the notice is given or copied. The *FCA* will consider any response but will normally not decide against publication of a *warning notice* statement on the grounds of unfairness solely because it is claimed that publication could have a negative impact on a *person*'s reputation. A *person* to whom the *warning notice* is given or copied who seeks to demonstrate potential unfairness from publication must provide clear and convincing evidence of how that unfairness may arise and how he could suffer a disproportionate level of damage. He would need to demonstrate that publication could materially affect his health, result in a disproportionate loss of income or livelihood, prejudice criminal proceedings to which he is a party or give rise to some other equal degree of harm. Arguments made solely on the basis that it is unfair to publish information at this point of the enforcement process will have no effect on the *FCA*'s decision. Similarly, arguments about the merits of the *warning notice* itself will not be material to publication decisions; arguments of this nature should instead be made separately and later in the process by way of representations to the *warning notice*.

6.7G Any *warning notice* statement the *FCA* publishes will make clear that:

- (a) the *warning notice* is not the final decision of the *FCA*;
- (b) that the recipient 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*, and

(c) if a *decision notice* is issued, the subject of the notice will have the right to refer the matter to the Upper Tribunal which will reach an independent decision on the appropriate action for the *FCA* to take.

6.7H Publication will generally include placing the *warning notice* statement on the *FCA* website. The *FCA* will also consider what information about the matter should be included on the *Financial Services Register*.

...

6.10 Publishing notices is important to ensure the transparency of ~~FSA~~ *FCA* decision-making; it informs the public and helps to maximise the deterrent effect of enforcement action. The ~~FSA~~ *FCA* will upon request review *warning notice statements, decision notices, final notices* and related press releases that are published on the ~~FSA's~~ *FCA's* website. The ~~FSA~~ *FCA* will determine at that time whether continued publication is appropriate, or whether notices and publicity should be removed or amended.

...

6.10B The ~~FSA~~ *FCA* expects usually to conclude that *warning notice statements*, notices and related press releases that have been published for less than six years should not be removed from the website, and that notices and related press releases relating to prohibition orders which are still applicable should not be removed from the website regardless of the length of time they have been published.

6.10C In cases where the ~~FSA~~ *FCA* publishes a *warning notice statement* and the *FCA* subsequently decides not to take any further action, or where it publishes a *decision notice* and the subject of enforcement action successfully refers the matter to the *Tribunal*, the ~~FSA~~ *FCA* will make it clear on its website that the *warning notice* or the *decision notice* no longer applies. The ~~FSA~~ *FCA* will normally do this by publishing a discontinuation notice with the consent of the *person* to whom the discontinuation notice has been copied.

Appendix 2

Designation of Handbook Provisions

FSA Handbook provisions will be ‘designated’ to create a FCA Handbook and a PRA Handbook on the date that the regulators exercise their legal powers to do so. Please visit our website¹ for further details about this process.

We plan to designate the provisions of the Enforcement Guide which we are proposing to create and/or amend within this Consultation Paper as FCA provisions.

1 One-minute guide <http://media.fsahandbook.info/latestNews/One-minute%20guide.pdf>

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