

PS13/3

Financial Services Authority

The FCA's use of temporary product intervention rules

March 2013

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This Policy Statement reports on the main issues arising from Consultation Paper 12/35 *The FCA's use of temporary product intervention rules* and publishes the FCA's Statement of Policy on making temporary product intervention rules.

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Copies of this Policy Statement 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
ESMA	European Securities and Markets Authority
FCA	Financial Conduct Authority
FOS	Financial Ombudsman Service
FSMA	Financial Services and Markets Act
MIFID	Markets in Financial Instruments Directive
MIFIR	Markets in Financial Instruments Regulation
OFT	Office of Fair Trading
PRA	Prudential Regulation Authority
PS	Policy Statement
RDR	Retail Distribution Review
SoP	Statement of Policy
TPIR(s)	Temporary Product Intervention Rule(s)
UCIS	Unregulated Collective Investment Scheme

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Overview

Why we are publishing this paper

- 1.1 In Consultation Paper (CP) 12/35, published in December 2012, we consulted on when and how the Financial Conduct Authority (FCA) will consider making temporary product intervention rules (TPIRs). The CP contained the draft Statement of Policy on making TPIRs, as the FCA is required to produce under Section 138N of the Financial Services and Markets Act (FSMA) (as amended by the Financial Services Act 2012).
- 1.2 In this paper, we summarise the responses we received to this consultation, and outline how our view of the process that the FCA will employ to make TPIRs has evolved as a result.

Structure and scope of this Policy Statement

- 1.3 In Chapter 2, we summarise the responses to the questions which we set in the CP, and set out our own response to the points made by respondents. We also respond to other points made by respondents which fall outside the boundaries of the questions asked in the CP.
- 1.4 Chapter 3 comprises a revised text of the FCA Statement of Policy.
- 1.5 In Chapter 4, we discuss next steps.
- 1.6 Annex 1 contains a list of non-confidential respondents to the Consultation Paper.

Who should read this paper

- 1.7 We believe that this paper will interest all product provider and distributor firms which the FCA will regulate, and industry associations. It will also be of significant interest to consumers and consumer groups.

- 1.8 Other regulators and regulatory bodies considering similar issues may also be interested in this paper, particularly in the EU where future directives might include provision for product interventions.

High-level summary of responses

- 1.9 We received 51 responses to the consultation. A list of non-confidential respondents can be found in Annex 1.
- 1.10 Responses from **consumer bodies** were generally positive about the use of TPIRs and some explicitly welcomed the broad approach to defining the circumstances which might trigger the use of a TPIR, recognising that this was designed to give flexibility.
- 1.11 Responses from **firms and industry bodies** generally accepted the case for the FCA to make TPIRs, but were less supportive than consumer groups. However, they raised some concerns about the level of clarity offered by the Statement of Policy as drafted in the CP, the process that the FCA will use to contact firms, the timeliness of this contact when it makes TPIRs, and the potential impact upon innovation.

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Responses to questions from CP12/35

2.1 In this section, we examine responses to the questions we asked in the CP.

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

Responses from consumer bodies

2.2 Consumer groups welcomed the introduction of the SoP, and generally agreed that the broad range of scenarios in the CP indicated the need for TPIRs. One consumer body welcomed that the FCA will be looking at the 'potential' for consumer detriment (and not just crystallised detriment) in its analysis.

2.3 While some consumer groups agreed with our view that it would be 'inappropriate to provide a full list of scenarios where TPIRs could be used', one argued that the high-level nature of the examples cited might reduce their usefulness as a deterrent. Some respondents from consumer groups anticipated that TPIRs could be considered for use in the consumer credit sector when regulation passes to the FCA in 2014.

Responses from firms and industry bodies

When TPIRs should be used

2.4 In general, most opinions from industry respondents said that the FCA should consider making TPIRs where there is the risk of significant detriment, although some qualified this by

saying that TPIRs should be used only in the most extreme cases, or as a last resort. A number of respondents highlighted the importance of ensuring that rules were clearly targeted at the source of detriment in order to reduce 'collateral damage' to firms and consumers.

- 2.5 Some industry respondents were concerned that TPIRs could be used to protect consumers from market volatility. Others argued that products should not be removed from the market because they are too complex, or that the regulator should not intervene in relation to the types of client to whom firms offer their products.
- 2.6 Some firms and industry bodies welcomed our expectation that in most situations the FCA would consult before making rules, observing that the act of consulting could in itself act as a warning to investors and firms. Some respondents noted that making rules before consultation may allow insufficient time to assess, eliminate or mitigate unintended consequences in the rulemaking process.
- 2.7 Most industry respondents argued that it was essential that the FCA's decision-making process was robust, and that the use of TPIRs should be subject to strong internal governance by FCA staff with the appropriate expertise.
- 2.8 Some respondents expressed concern that intervention rules would be based upon the perceived *risk* of consumer detriment rather than actual evidence of detriment. These respondents noted that this could lead to overzealous regulation.

Interaction with existing regulation

- 2.9 A number of industry respondents expressed a preference for the use of other regulatory tools, such as intensive supervision, ahead of TPIRs. A particular concern of a number of industry respondents was that poor selling practices and ineffective product governance should not be confused with evidence of product failure. Some industry respondents argued that some of the examples cited in the CP referred to selling practices rather than product features.
- 2.10 Whilst most industry respondents agreed with our view that the regulator should not pre-approve products, one firm argued that an expanded system of pre-approval for a wider range of products would prevent problematic products from reaching the market in the first place.

Market intelligence

- 2.11 Some firms argued that temporary product intervention rules should not replace positive and proactive dialogue with the industry, noting that that intelligence should be gathered from all market participants, and citing industry bodies and the Panels as key stakeholders who could provide useful intelligence.

Customer differentiation

- 2.12** A key concern amongst some industry respondents was that when making rules (including TPIRs), the FCA should consider the different interventions that might be deployed in retail and wholesale markets, the different consequences for different types of customers and the diverse way in which products are distributed. Some respondents suggested that wholesale products will rarely cause widespread detriment to consumers (unless these are subsequently traded in retail markets), and argued that a proportionate approach would call for the FCA to focus the application of TPIRs in retail markets.
- 2.13** Some industry respondents argued that it may be appropriate for some sales to continue (such as sales to sophisticated consumers) while others were prevented by an intervention such as a TPIR.

Our response

We welcome most respondents agreeing that making rules before consultation will be a useful tool for preventing harm to consumers. We still believe TPIRs should be used where the FCA identifies a threat to its statutory objectives (whether in wholesale or retail markets), and where prompt action is required.

Any TPIR made by the FCA will be subject to the governance process outlined in the SoP. We believe this will ensure that any proposed rules are subject to adequate internal challenge. The FCA will publish its reasons for intervention at the time when it makes a TPIR.

We regard the use of TPIRs as a supplement to, and not a replacement for existing regulatory tools, including supervision of firms. In our CP we noted that the FCA's approach will be geared towards earlier intervention and a lower risk tolerance, but that in most situations, the FCA will expect to consult on permanent rules which aim to advance its statutory objectives. The FCA's supervision of firms and revised data strategy will assist in gathering intelligence.

The FCA will continue to use the existing body of point-of-sale rules and supervision to address mis-selling at the point of sale. However, as we have identified in the CP and in past publications, targeted early intervention can be more effective in preventing harm to consumers than waiting until after detriment has occurred.

A large number of responses appear to characterise the FCA's power to make TPIRs (or product intervention rules more generally) as a 'product banning power'. Banning flawed products is only one possible type of product intervention, and one which is likely to be reserved for the most serious cases. Other types of intervention may, for instance, focus on problematic product features, or inappropriate marketing or selling practices. For the latter type of intervention,

TPIRs may be used to supplement existing rules, where specific problems are identified that require prompt action.

The FCA has no plans to introduce pre-approval of all products as a matter of course.

We note the concern of some industry respondents that TPIRs will be used against products which perform poorly due to market volatility. Generally speaking, our view of consumer detriment does not encompass losses arising from the crystallisation of market risk (such as investment performance) in well-designed products that are appropriately marketed to consumers for whom they are appropriate or suitable.

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

Responses from consumer bodies

2.14 Scenarios suggested for FCA intervention by consumer organisations included:

- products with complex features which are not well explained to consumers;
- products with complex or opaque charges, or where hidden ancillary or default charges impede choice and impose additional search costs, reducing effective competition;
- insurance products where the percentage of successful claims is below the industry norm;
- products or product features that on a 'common sense basis' do not treat customers fairly – for example, by being poor value for money.
- certain elements of fee-charging debt management agencies;
- packaged bank accounts;
- situations where a provider reduces or withdraws access to products or services which meet a clear financial need for a certain sector of the market, such as basic bank accounts; and
- products which can prove difficult for consumers with low financial capability to understand.

Responses from firms and industry bodies

- 2.15 Most industry respondents believed that circumstances for using TPIRs should be very limited, or that they should not be used at all. Many respondents wanted to see more limitations on the FCA's use of TPIRs, for instance by establishing benchmarks for the use of the power.
- 2.16 Most industry respondents regarded the circumstances outlined in the CP as sufficiently broad to allow the FCA to act, that this should be where evidence shows clear and substantial likely detriment to consumers, and that this would not be correctable by supervisory interaction with firms, or by some other means.
- 2.17 However, some firms did volunteer examples of instances when it might be necessary to make TPIRs. These included products where:
- there is an unexpected trend observed after launch;
 - latent detriment will not be revealed until a long time in the future;
 - fees or the charging structure is unclear;
 - reward and recognition drive inappropriate sales practices; and
 - they are so complex that they require extensive sales training.

Our response

We welcome the suggestions provided to this question. Where problems are detected in relation to new or established products the FCA will consider the full range of regulatory tools at its disposal, including product intervention rules (both made after consultation and TPIRs) and as always any resolution achievable through supervisory action.

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

Responses from consumer bodies

- 2.18 Responses to this question from consumer bodies were mixed. Some agreed that website publication should be the principal means of communication with firms and would create an appropriate level of awareness. However, there was some concern that the FCA would

not necessarily be able to contact all affected firms, leaving the onus on firms to check for new rules.

- 2.19 It was also noted that regulatory transparency would incentivise firms to improve their processes, and would enable consumers to identify poor firms.

Responses from firms and industry bodies

Interaction before making TPIRs

- 2.20 Some industry respondents argued that lack of engagement with firms and awareness of TPIRs would diminish their effectiveness as a consumer protection measure, which could result in damage to the reputation of the industry and firms.
- 2.21 A number of industry respondents stated that the FCA should be able to contact all affected firms directly either before or when it publishes a TPIR (perhaps when it undertakes analysis of the market), and that formal engagement with firms concerned should take place at the earliest opportunity. Some argued that continuous communication from the FCA (possibly via supervisors) should make stakeholders aware of products, product features and terms and conditions that the FCA considers problematic. Respondents argued that the result of such cooperation might be to enable effective supervision processes which would negate the need for TPIRs, ensure that rules are appropriately drawn and minimise disruption.

The need for direct contact with firms when making TPIRs

- 2.22 There was general agreement amongst firms and industry respondents that a clear framework and appropriate communication was required to ensure that firms are aware of TPIRs when they are made. They also agreed the FCA should use reasonable endeavours, or go further, to ensure information about the rule is communicated as widely as possible. However, a minority of firms suggested that firms should be able to use their existing processes to spot updated regulatory information. Many respondents considered it unacceptable that firms should find out about a TPIR from the media, and that the FCA publishing a TPIR on its website alone is not enough to ensure that all parties are informed.
- 2.23 Most industry respondents suggested that the FCA should always, as a minimum, take all measures that the FSA currently takes to publicise such announcements. But many argued that the FCA would need to do more communication with firms, industry bodies (and consumers) than was implied by that suggested in the SoP. Some suggestions for additional steps were:
- a commitment to making direct contact (perhaps by email) with all regulated firms, to make clear the types of firms and products to which TPIR will (and will not) apply;

- publishing a clear, detailed rationale for use of TPIRs, and inviting feedback on this statement;
- circulating Dear CEO letters (perhaps 24 hours before the rule is made);
- contacting trade associations, for dissemination to their membership;
- a requirement to liaise with Practitioner, Small Business and Consumer Panels before a rule is made;
- communicating advice for consumers where necessary; and
- detailed guidance on the aims and expected outcomes of the TPIR.

Communication with consumers

- 2.24** Firms and industry bodies highlighted the need to communicate clearly and quickly with consumers about the reasons for making a TPIR. Some industry respondents noted that ambiguity in how the FCA communicates TPIRs, or misleading press coverage of TPIRs, could lead to confusion and wider customer detriment.

The need for time for firms to react

- 2.25** A number of firms and industry bodies argued that the FCA should give firms a reasonable timeframe between announcing the TPIR and it coming into force wherever possible, in order for them to implement the TPIR, to publicise information to consumers, to make system alterations, and to inform their staff. Some industry respondents warned of harm to consumers if media reports prompted consumers to redeem or withdraw from products subject to a TPIR, but firms had not made the requisite changes to their product offering.

After publication: post-implementation reviews and the FCA Annual Report

- 2.26** A number of firms and industry bodies suggested that the FCA should commit to conducting a post-implementation review, to ensure that TPIRs are meeting expectations, to gauge whether anticipated risk has materialised, and to allow any necessary changes to be made where the rule is in force. Several respondents observed that the FCA could provide an annual report on the creation of TPIRs, their use and their purpose, or alternatively include commentary on TPIRs made in each year in its *Annual Report*.
- 2.27** Some respondents suggested that when it expires, notice of the TPIR should be completely removed from the website or the Handbook to avoid confusion. They said the FCA should publicise a TPIR lapsing, and set out why, to the same extent as when it makes that TPIR.

Our response

We acknowledge respondents' concerns about how the FCA will engage with firms before and at the point of making TPIRs. We agree that for most retail financial products, the FCA's communication strategy around a particular TPIR will have a great bearing on the success of the rule in achieving its intended aim. For this reason, in the CP we said the FCA will make reasonable endeavours to ensure that it communicates information about the rule as widely as possible.

Before publishing a TPIR, the FCA will seek to engage with firms through the usual supervision process. The extent to which the FCA will be able to discuss the use of a TPIR with an affected firm is likely to depend on how promptly it believes that action is required to address the threat of detriment, the nature of the product concerned, and the nature and number of firms involved.

We note suggestions that simply publishing details of a TPIR on the FCA website alone would be insufficient. Website publication will represent the minimum level of communication that the FCA will have with firms and consumers before and up to the point when a TPIR is made. The FCA will generally consider the most appropriate communication strategy for the particular circumstances in which it is required to make TPIRs. However, firms must maintain an up-to-date understanding of regulatory information and changes to rules that are relevant to them.

To reflect this, we propose to insert the following line between paragraphs 40 and 41 of the draft SoP as set out in the CP:

'Communication of temporary product intervention rules

Before making a temporary product intervention rule, the Committee will consider how affected firms and consumers are to be informed of the rule in good time.'

Some industry respondents asked for a lead time between the announcement and implementation of a rule. While in theory it could be possible for the FCA to make TPIRs with a later implementation date, this will need to be balanced against the need for prompt action. When the FCA makes TPIRs, it will consider the most effective way of delivering the rule as part of the rule-making process.

We note the suggestions of industry respondents that the FCA should conduct a post-implementation review as a matter of course after making a TPIR. Having made a TPIR, the FCA will need to consider whether to replace the TPIR with a rule made after consultation, or to let it lapse after its set term (of no more than 12 months). A consultation on permanent rules would provide an appropriate forum for a thorough review of the TPIR's impact, and suggest changes if and where the TPIR had not worked as intended. Where the FCA allows the rule to lapse, or replaces it with a different rule, this would also involve considering the impact of the original rule. In other circumstances it may not be appropriate or proportionate to undertake a formal review.

However, when the FCA first makes a TPIR under Section 138N of FSMA (as amended by the Financial Services Act 2012), it will undertake and publish a post-implementation review to assess the *process* employed for making the rule, after an appropriate period has lapsed following the making of the TPIR.

The FCA will report on the use of TPIRs in its *Annual Report*.

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?

Responses from consumer bodies

- 2.28 Consumer bodies generally argued that the FCA should focus on the need for immediate action where detriment is imminent, rather than giving precedence to building awareness amongst firms, and that raising awareness of TPIRs amongst firms should be coupled with raising awareness amongst consumers.

Responses from firms and industry bodies

Lack of clarity about the FCA's intentions

- 2.29 Whilst some respondents recognised the difficulty in providing complete certainty around when TPIRs would be used, most firms and industry bodies asked that the FCA should be clearer about the circumstances and the processes which it will follow in making such rules. Most respondents felt that increased transparency around the use of TPIRs would help to mitigate a lack of certainty as a result of their flexible nature. A large number of industry responses called for the FCA to offer real-life examples of when TPIRs might be made.
- 2.30 It was generally felt that a number of the key concepts that would determine the circumstances in which the FCA would act were ill-defined, such as whether the FCA would act in 'urgent' circumstances or where 'prompt' action was needed; how risk will be measured; and the evidence threshold required for the FCA to make TPIRs.

The need for balance in decision-making

- 2.31 Most industry respondents agreed that TPIRs will have a dramatic impact on consumers and firms, so their use, and the speed with which they are introduced, must be proportionate to the level of detriment and the number of customers exposed to this detriment.

- 2.32 Some firms and industry bodies recognised that TPIRs will normally be reserved for instances where prompt action is required, with one arguing that ‘the need for communication should not prevent urgent action being taken where there is evidence of actual or likely detriment’, although others stated that they would expect those instances to be rare and with clearly defined parameters.
- 2.33 However, this acknowledgement was not universal, as some firms argued that there was not necessarily a trade-off between market awareness and the timeliness and effectiveness of intervention, and that effectiveness would be enhanced by the market being aware of the intervention.

The need for appropriate governance

- 2.34 Industry respondents had suggestions on what would constitute appropriate governance.
- 2.35 Some firms suggested that the decision-making process for TPIRs as set out in the SoP was too high level. Respondents requested that the FCA should:
- provide a broad overview of the governance process that it will follow, and alternative options to making a TPIR;
 - ensure that decision makers had appropriate seniority and independence;
 - include an exploration of the potential for using other regulatory powers;
 - ensure that TPIRs will not be implemented until adequate consideration and strategic planning time has been devoted to examining delivery of a permanent solution;
 - establish a mechanism to ensure that the FCA learns from past interventions when developing new ones; and
 - provide more detail of the rule making process and what thresholds will apply to the FCA's analysis.
- 2.36 Some respondents argued that TPIRs must be backed up with high-quality underlying research, which should be published to inform firms of the issues as early as possible.
- 2.37 Some firms expressed concern that the FCA's proposed approach did not give firms the right or the opportunity to present their views to the FCA.

Our response

We acknowledge the concerns of firms with regard to clarity around the FCA's intentions for using TPIRs.

We note that the power to make TPIRs has been provided to the FCA by statute.

Section 138M of FSMA, as amended under the Financial Services Act 2012, specifically empowers the FCA to make product intervention rules without consultation, where it is necessary or expedient to do so in order to advance its consumer protection, competition or (if the relevant order is made by Treasury) market integrity objective. The legal threshold for action in s. 138M has been set low and gives the FCA flexibility to respond to threats to our statutory objectives; it requires neither urgency nor promptness in the situation to be addressed.

The FCA will consider using TPIRs where it identifies a threat to its objectives which requires prompt action. However, the FCA has the discretion under statute to exercise this rule-making power in other circumstances where it deems it necessary or expedient.

We do not consider it appropriate or useful to speculate in advance on the nature of what those threats might be. Nor do we consider it appropriate to specify in advance a threshold of consumer detriment which must be met to justify the use of a TPIR, as this might have the effect of limiting the FCA's freedom to act in future.

One respondent asked us about the status of examples that we published in March 2012.¹ These were provided to the Treasury Select Committee as an aid to the legislative process when making the Financial Services Act 2012. They are intended to be purely illustrative, and highlight some real life scenarios of conduct issues relating to specific products or product types in which a regulator might have chosen to make TPIRs, based on the previous experience of the FSA and other regulators. However, we remind stakeholders that these examples are not exhaustive, and that the FCA may find it necessary or expedient to make TPIRs in situations that are different from those illustrated. Furthermore, should the same (or broadly similar) problems reoccur, it is not necessarily the case that the FCA would choose to make a TPIR.

We did not intend the words 'prompt' and 'urgent' in the SoP to imply a specific threshold, or that they should reflect different policy standards. To avoid confusion we have replaced the use of the word 'urgent' in the SoP with 'prompt'.

Some respondents raised specific concerns about the risk of challenge if the FCA does not gather enough evidence before it acts. TPIRs will be subject to the same forms of challenge as the other rules the FCA makes. The FCA will be subject to proportionate evidential standards, and will need to satisfy itself it has enough evidence to decide whether to make a TPIR. In considering this we expect a court to take into account the fact that Parliament intended these measures to allow prompt, temporary intervention.

We note the concerns of some industry respondents around engagement with industry, including industry bodies and the Panels. The FCA will generally seek to

¹ 'Examples of previous market issues where product intervention rules might have been considered' at www.fsa.gov.uk/static/pubs/other/previous-market-product-intervention.pdf

engage with industry or consumer representatives, Panels, or firms (as relevant) before making TPIRs, provided that this does not impede its ability to respond promptly to the identified threat. However, it is difficult to predict in advance the kind of timeframe that the FCA will adhere to when making TPIRs, given our expectation that they will generally be used where prompt action is necessary. A requirement for the FCA to contact specified third parties before it makes a rule may restrict its freedom to act with the swiftness necessary.

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

Responses from consumer bodies

- 2.38** Generally, consumer bodies agreed that balancing the risk to potential consumers with those who already hold products would be the right approach, while noting that such incidences where TPIRs will negatively impact existing holders will be rare. These groups suggested that the FCA should maintain an ongoing dialogue with consumers to build up understanding of concerns, with one group citing communication to consumers in the PPI case as being ‘drawn out and problematic’.
- 2.39** In their responses, consumer organisations suggested the following as possible mitigants to avoid harm to these consumers:
- mandating communication from firms to consumers, including contacting customers in writing;
 - publication of a factsheet to consumer organisations, Citizens’ Advice Bureaux and the Money Advice Service, about the product and the reasons for the intervention; and
 - publishing investor warnings of the type used by ESMA.²
- 2.40** One consumer organisation suggested reviewing the impact of the FSA’s intervention on Traded Life Policy Investments, to learn about how more could be done to inform existing investors about potential problems with a product.

Responses from firms and industry bodies

- 2.41** Responses from firms and industry bodies to this question were mixed. Some firms considered that there is the potential for negative impact on consumers who already hold a product that is affected by a TPIR, and that the FCA should balance the needs of potential and existing consumers. Some noted that it is difficult to assess in advance the potential

² An example suggested was the FOREX warning ESMA/2011/412 of 5 December 2011, at www.esma.europa.eu.

harm to consumers, and in practice the nature of the intervention and type of products affected will be factors which determine how consumers should best be protected. At the other extreme, one firm argued that 'in no circumstances should existing customers of a product be disadvantaged by a rule designed to protect potential customers'.

- 2.42 Many cited the example of a product which is tradable on a secondary market, and where the negative publicity from the implementation of a TPIR may reduce liquidity, and result in customers registering a loss on their investment.
- 2.43 A number of industry respondents suggested that the best way of protecting consumers is to ensure that the FCA carries out full and detailed impact analysis before making any TPIR, and that this should detail the impact that the FCA expects a TPIR to have on consumers who already hold products.
- 2.44 Some industry respondents also highlighted potential negative effects for customers who held products that were similar to an affected product, and that this could result in a 'domino effect' if consumer confidence is dented in one product or sector.

Our response

We agree with respondents who argued that it will be relatively rare that existing consumers will be negatively affected by the FCA making a TPIR in relation to a particular product. However, we acknowledge that such a situation might occur where, for example, a TPIR is made which brings attention to problems with a product, and a subsequent loss of investor confidence could then lead to liquidity issues. Where this occurs, balancing the need to protect existing and future customers of the product will form part of the FCA's analysis.

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

Responses from consumer bodies

- 2.45 Most consumer bodies broadly agreed that it should be possible for a firm to recognise whether a new product is likely to cause harm to consumers before making a decision to invest significant sums in product development. Others noted that consumer detriment was not an acceptable price of ensuring ease of entry into the market by new firms, with one arguing that '...innovation for the sake of innovation does not help anyone'.

- 2.46 It was also argued that addressing detriment early would benefit firms, by reducing redress costs and leading to fewer complaints, and that a stronger enforcement approach by the FCA would ensure market discipline.
- 2.47 However, one consumer body noted that how and when the FCA would make TPIRs was uncertain, and there could be some impact on innovation; alternatively firms may be incentivised to minimise development spend and go straight to market, so if one product is 'lost' to a TPIR another can be brought forward. This respondent argued that firms should have sufficient guidance about what is acceptable.

Responses from firms and industry bodies

- 2.48 A significant majority of industry bodies and firms who responded to this question said the FCA having the power to make rules before consultation would have a detrimental effect on innovation. Within these firms, however, some argued that the FCA's power to make TPIRs would in itself mean that a detrimental effect on innovation was inevitable, whereas others argued that the impact on innovation was difficult to assess until the FCA is clearer about the scope and use of TPIRs. Others argued that disproportionately frequent use of TPIRs, or their application without an adequate decision framework would stifle innovation and market entry.
- 2.49 However, there were some dissenting opinions, as three firms broadly agreed with the FSA's view that TPIRs would not necessarily raise barriers to entry or be detrimental to innovation.

Reasons for falling innovation

- 2.50 Respondents argued that the use of TPIRs (or even the possibility of TPIRs being made) would reduce innovation because of:
- firms being unwilling to undertake the high cost of product development, or higher anticipated regulatory costs, if there is a risk of the product being banned;
 - the danger of reputational damage to a firm if it is the subject of an intervention;
 - firms being unwilling to be first to market with an innovative product, for fear of regulatory intervention, especially where the product could be difficult for consumers to understand;
 - firms and regulators failing to agree on the risk of consumer detriment arising from products and about the value for money offered by their products, or the target market for a product; and
 - confusion amongst firms about what is needed to comply with a TPIR, which may result in withdrawal of products.

Possible impacts of the power to make TPIRs

2.51 Firms that identified a potential detrimental effect on innovation as a result of the FCA's power to make TPIRs suggested the following impacts:

- a risk that firms will limit their product offering to 'vanilla' products, thereby restricting consumer choice and 'infantilising' retail investors who are capable of assessing their own risk appetite;
- a reduction in new entries into the market;
- a reduction in the willingness of firms to provide capital financing for new credit products or providers; and
- a culture where firms look to the regulator for 'sign-off' of products.

Our response

We consider that the FCA's power to make TPIRs will not impact on firms' incentives to innovate in ways that benefit consumers, and provides an enhanced level of consumer protection. In our view, the potential benefits from this additional consumer protection offered by TPIRs will be significant.

However, we expect that the FCA's other tools will form the backbone of its consumer protection strategy. Where we do make TPIRs, our governance process should ensure that sufficient analysis will be conducted internally before a decision is made to make a specific rule.

Also, not all innovation is necessarily beneficial, and some innovation by firms may not necessarily bring benefits to consumers. We consider that this is the type of innovation that is most likely to be affected by the prospect of the FCA's use of TPIRs.

If respondents (or any other stakeholders) consider that they possess evidence of benign product innovation being suppressed by the FCA's power to make TPIRs (or indeed by product intervention rules made after consultation), we invite them to submit this evidence, or approach us for discussion, so that it may be considered separately as part of the FCA's wider interest in promoting competition in the context of product governance and intervention.

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

Responses from consumer bodies

- 2.52 Consumer groups did not directly answer the question about the effect on protected groups of us publishing the SoP.
- 2.53 However, some offered views on the likely impacts that TPIRs being made might have on equality and diversity. One consumer body argued that there is no reason why TPIRs should adversely affect equality and diversity, if used appropriately. Another urged the FCA to consider using TPIRs to protect vulnerable customers from inappropriate products being targeted at them.

Responses from firms and industry bodies

- 2.54 Where industry bodies and firms answered this question, there was general agreement that publishing the SoP itself would have no impact on vulnerable groups. However, many industry respondents suggested that an impact assessment detailing the impact on protected groups should be undertaken before making TPIRs.
- 2.55 Some respondents attempted to predict the impact on protected groups that might occur from TPIRs being made, noting that the urgency with which TPIRs would be made meant that the risk that rules may exacerbate inequality or lack of access may be overlooked or misjudged. It was also suggested that a depressive effect on innovation may mean that fewer products are developed for niche markets such as protected groups.

Our response

We agree that publishing the SoP will not in itself have an impact on equality and diversity. However, when the FCA makes rules before consulting, it will assess the impact upon equality and diversity. It will also consider the impact of any TPIR on equality and diversity as part of any post-implementation review.

Other issues raised by respondents

- 2.56 Some respondents raised issues in addition to answering the questions in the consultation paper. We summarise these here.

Redress

- 2.57 Likely redress arrangements following the making of TPIRs were raised by a number of firms and industry participants.
- 2.58 The independent Financial Ombudsman Service (FOS) welcomed the FCA's strategy of making product intervention rules, noting that lessons learned from the FOS's work in resolving complaints should be fed back to firms to help prevent future problems. The FOS also confirmed that consumers holding a product subject to a product intervention rule, including those rules with unenforceability provisions, should seek redress through the usual channels; by complaining to the firm (and then to FOS if necessary), or alternatively by taking legal action. The existence of product intervention rules would be one factor that the FOS would take into account in its decision-making in individual cases.
- 2.59 Some industry respondents argued that redress arrangements were likely to be less clear in cases where product intervention rules were made than in cases of simple mis-selling by distributors. Some noted that if a provider's product was deemed to be at fault, then redress should come from them rather than from distributors. One firm argued that if a product or product feature becomes subject to a TPIR, it should not be assumed that all previous sales of the product were unsuitable.

Our response

We note the concerns of firms about redress. The FCA will consider arrangements for redress on a case-by-case basis, depending on factors such as the scale of consumer detriment, the product, and the type of intervention made. The FCA will work with all relevant parties to deliver proportionate and effective redress arrangements for consumers.

However, where a product intervention rule (temporary or not) incorporates an unenforceability provision we expect that consumers will find it much easier to make their case for redress. This is because they would only need to demonstrate to the firm (or the FOS or the courts) that the product was sold to them in breach of the rule after it came into force (i.e. the consumer would not have to show particular misconduct and that this had caused them loss).

Consumer credit

- 2.60 The CP attracted significant interest from the consumer credit sector, with respondents asking whether the FCA would make TPIRs which would affect their market.

Our response

Following Government proposals to transfer responsibility for consumer credit regulation from the Office of Fair Trading (OFT), we expect consumer credit regulation to move to the FCA from 1 April 2014.

The OFT will have its own rules over consumer credit until the transfer of regulation. As stated in *Journey to the FCA*,³ we propose to introduce an interim regime to make sure consumers are protected while we further develop our full regime, which will be introduced in 2016.

We published a Consultation Paper⁴ in March 2013 explaining our high-level approach on what this may mean for firms with consumer credit licenses following the transfer. We expect that the FCA will publish a more detailed Consultation Paper later in 2013.

When consumer credit products are brought under the FCA, it will consider the use of TPIRs in the same way as for any other product under its regulation.

The impact of claims management companies

- 2.61** A number of industry respondents, expressed concern about the role of claims management companies (CMCs) following the use of TPIRs.
- 2.62** Respondents noted their concerns about the regulation and accountability of CMCs, and other industry respondents noted that use of TPIRs may result in activity by CMCs, with potential negative implications for consumers.

Our response

We note the concerns of firms and industry bodies regarding CMCs. However, regulating these firms will be outside the scope of the FCA, and the potential for intervention by CMCs to intervene in cases where detriment occurs is in no way unique to TPIRs.

Value for money

- 2.63** A number of firms and industry bodies believed intervention in the field of value for money was not appropriate. Particular concerns were raised about how the FCA would assess

³ *Journey to the FCA*: www.fsa.gov.uk/static/pubs/other/journey-to-the-fca-standard.pdf

⁴ CP13/7, *High-level proposals for an FCA regime for consumer credit*: www.fsa.gov.uk/static/pubs/cp/cp13-07.pdf

value for money and the potential for the FCA becoming a price regulator. One respondent stated that '[the FCA] should consider its communication strategy on this issue, as we believe public statements on this issue may already be having a market impact'.

Our response

We noted in the CP that we do not envisage that the FCA will become an economic regulator in the sense that it will not, in general, set acceptable rates of return on certain products in the manner of some utility regulators. Our approach to product intervention on price and value for money grounds is set out in FS11/3.⁵ In that paper we said that 'it is essential for the regulator to ensure that such measures are used only when appropriate and when there is clear evidence of risk to consumers'. It would be inappropriate for us to rule out the use of a discretionary power by the FCA in any particular way. This includes the potential use of TPIRs to addressing consumer detriment or competition concerns arising from products which offer poor value for money.

Firms should be aware that intervention on value for money grounds would not necessarily take the form of a direct intervention in price, and might for instance comprise an immediate requirement for provider firms to disclose particular information such as claims ratios.

Interaction with European and other regulators

- 2.64** Several industry respondents mention the impact of European initiatives on the FCA's approach to product intervention. In particular, firms asked how the FCA will seek alignment between EU and UK product intervention rules.
- 2.65** A number of firms also noted that non-UK firms might 'passport-in' products into the UK market, and therefore may find it possible to avoid the impact of TPIRs. The respondents highlight that this may create an 'unlevel playing field' for UK-domiciled firms, which could impair the competitiveness of the financial sector in the UK.

Our response

We believe that the aim of the work being undertaken at European level is well aligned with the desire that the FCA will offer an enhanced degree of consumer protection. Intended reforms at European level regarding product intervention are currently limited to the Markets in Financial Instruments Regulation (MiFIR) and the Markets in Financial Instruments Directive (MiFID), and will only affect

⁵ FS11/3: 'Product intervention: Feedback on DP11/1': www.fsa.gov.uk/pages/Library/Policy/DP/2011/fs11_03.shtml

products which fall within the scope of those measures. Furthermore, these EU reforms are unlikely to come into effect before 2015 and are still subject to negotiations at EU level. By contrast, the FCA's power to make TPIRs is derived from FSMA, and its scope may include any firm regulated by the FCA and the products it brings to market.

The FCA will continue to play an active role in the discussions around a European approach to product intervention. Once EU-level proposals have been finalised, the FCA will review its SoP accordingly to ensure it remains compatible with relevant European legislation, and communicate any material changes to firms at the earliest opportunity.

While paragraph 36 of the SoP as published in the CP anticipates the changes to MIFIR, and the likelihood of further changes to the product intervention framework arising from European regulation, we consider that this paragraph is likely to become obsolete as these changes are introduced at European level. For this reason we have removed this paragraph from the SoP.

Unintended consequences of making TPIRs

2.66 A number of responses highlighted the potential for unintended consequences from the FCA's use of TPIRs, noting that this risk was normally mitigated through consultation.

2.67 Possible unintended consequences cited by industry respondents were:

- firms voluntarily restricting the supply of products to some (or all) customers who may benefit from the product, for fear of being subjected to TPIRs;
- regulatory arbitrage (such as general insurance providers redesigning products as non-insurance based service offerings, to escape FCA regulation);
- a possible reduction in the availability of professional indemnity insurance;
- additional costs to firms as a result of dealing with the increased regulatory risk;
- damage to the reputation of firms and the industry; and
- potential 'second round' impacts for firms and consumers (such as a customer not being able to complete a house purchase as a result of a mortgage product being banned).

Our response

As with any regulatory intervention, it is possible that rules made before consultation will have impacts other than those intended. The FCA's analysis ahead of making TPIRs will assess the likely impact of the rules. As we have outlined in the SoP, any TPIR will be subject to a process of internal challenge, including consideration by the FCA Board, before it is made. As identified by many respondents, the FCA will have regard to the regulatory principles set out in section 3B of FSMA when making TPIRs.

Market failure analysis

- 2.68** A significant number of firms and industry bodies responded to the market failure analysis provided in our CP.
- 2.69** Some industry respondents argued that the market failure analysis provided in the CP gave no explanation about how the FCA would react to detriment created by behavioural biases amongst consumers or asymmetries in market power. Others argued that the examples outlined in our market failure analysis (such as bundling and tying) were not sufficient to warrant making temporary rules without consultation.
- 2.70** Other responses noted that for a firm to ensure that a TPIR is necessary and proportionate, robust analysis must be undertaken in lieu of a full cost-benefit analysis.

Our response

The purpose of the market failure analysis provided in the CP was to provide a high-level theoretical underpinning for the FCA's policy on making of TPIRs. It was not intended to identify particular demand-side weaknesses, market power asymmetries or behavioural biases that might prompt the FCA to make TPIRs.

The FCA may make TPIRs in order to respond to a particular problem in a particular market, where it believes it would be the most efficient response in any particular case or set of cases. It will undertake analysis to determine whether TPIRs are an efficient response, and will consider publishing this analysis.

TPIRs and the competition objective and duty

- 2.71** A number of industry respondents asked us to be clearer about when the FCA would intervene on competition grounds, with some arguing that it is unlikely that the advancement

of its competition objective could ever warrant use of TPIRs. These respondents warned about the high risk of unintended consequences when intervening on competition grounds, and also that inappropriate use of TPIRs could damage competition and result in harm to consumers. Respondents also noted that it was not clear what evidence threshold will be required when setting competition considerations against consumer protection concerns.

- 2.72** Some industry bodies argued that particular skills are needed to assess the competitive state of a particular product market; they suggest the FCA will have to liaise with competition authorities, or another party with relevant expertise to ensure that its interventions have no distorting impact on competition.

Our response

Section 138M of FSMA (as amended by the Financial Services Act 2012) empowers the FCA to intervene using TPIRs to advance its competition, consumer protection and (if the relevant order is made by Treasury) market integrity objectives. While we expect that most use of TPIRs will be on the grounds of consumer protection, it would be inappropriate for us to rule out using them where competition or market integrity grounds warrant prompt action.

The FCA will be required to consider whether other, more pro-competition approaches may be effective in resolving the underlying problem when making TPIRs, in line with its competition duty. The FCA may well find that a number of measures that it considers introducing will advance both its consumer protection and competition objectives (for example by requiring specific information to be provided to consumers).

Furthermore, while the FCA will work closely with the competition authorities, it will also contain its own dedicated competition department.

3

Statement of Policy for making temporary product intervention rules

- 3.1 This chapter forms the revised text for the FCA Statement of Policy for making temporary product intervention rules, following consultation. In addition to changes discussed in the previous chapter, we have also made some minor drafting changes and changes to the ordering of the sections of the SoP.

Introduction

1. In general terms, product intervention rules are rules made under Section 137D of the Financial Services and Markets Act 2000 (FSMA) (as amended by the Financial Services Act 2012) aiming to tackle issues relating to specific products (or types of products), product features or marketing practices relating to specific products. They exist alongside other regulatory tools, such as other general rules, guidance, Variations of Permission,⁶ imposition of requirements⁷, supervisory interaction with firms and enforcement action.
2. Product intervention rules made without consultation (under Section 138M of FSMA) are limited to a maximum duration of 12 months and are referred in this document as 'temporary product intervention rules'.
3. Temporary product intervention rules will offer protection to consumers in the short term while allowing either the FCA or industry to develop a more permanent solution to address the source of detriment. They may also be made in response to competition or (if applicable) market integrity issues.

⁶ By the regulator, known as Own Initiative Variations of Permission (OIVoP).

⁷ By the regulator, known as Own Initiative Requirement Power (OIRep).

4. This statement sets out the FCA's policy on the making of temporary product intervention rules.⁸ This statement is required by Section 138N of FSMA.

General rule making and product intervention

5. FSMA empowers the FCA to make general rules as appear necessary or expedient for the purpose of advancing one or more of its operational objectives (Section 137A).
6. It also confirms that the FCA may use its general rule-making power to prohibit authorised persons from entering into specified agreements (Section 137D).⁹ These rules may be made to advance:
- a) the consumer protection objective;
 - b) the competition objective; or
 - c) if the Treasury makes such an order, the market integrity objective.
7. Section 137D(2) sets out that the FCA may prohibit authorised firms from:
- a) entering into specified agreements¹⁰ with any person or specified person¹¹;
 - b) entering into specified agreements with any person or specified person unless requirements specified in the rules have been satisfied;
 - c) doing anything that would or might result in the entering into of specified agreements by persons or specified persons, or the holding by them of a beneficial or other kind of economic interest in specified agreements; and
 - d) doing anything within paragraph c) unless requirements specified in the rules have been satisfied.
8. Section 137D(2) makes it clear that a range of options would be available to us in making rules prohibiting authorised persons from entering into specified agreements.
9. The extent and intrusiveness of the rules which are made will generally depend on the type of intervention deemed necessary to address effectively the problems identified, having regard to whether the intervention would be a proportionate response to the perceived risk to consumers, competition failings or, if applicable, market integrity issues.

8 In this document, 'temporary product intervention rules' are product intervention rules made without prior consultation as defined in s.138M.

9 The FSA has already outlined the kind of product interventions which it may undertake in FS11/03: www.fsa.gov.uk/pages/Library/Policy/DP/2011/fs11_03.shtml.

10 'Specified agreements' are those meeting the description specified in rules by the FCA. It is of no relevance whether the entering into of a specified agreement itself constitutes the carrying on of a regulated activity or whether, in a case within paragraph 2.3 (c) or (d), the specified agreements are with the authorised persons concerned or anyone else.

11 Specified persons' are those meeting the description specified in rules by the FCA.

10. Rules may range from requiring certain product features to be included, excluded, or changed, requiring amendments to promotional materials, to imposing restrictions on sales or marketing of the product or, in more serious cases, a ban on sales or marketing of a product in relation to all or some types of customer.
11. Where the product is provided by a business outside of the UK, rules may be made targeting regulated activities by authorised persons in the UK that would lead to a specified agreement being formed (see Sections 137D(2)(c) and (d)).
12. In relation to agreements entered into in breach of product intervention rules, Section 137D(7) sets out that the rules may:
 - a) provide for a relevant agreement or obligation¹² to be unenforceable against any person or specified person;
 - b) provide for the recovery of any money or other property paid or transferred under a relevant agreement or obligation by any person or specified person; and
 - c) provide for the payment of compensation for any loss sustained by any person or specified person as a result of paying or transferring any money or other property under a relevant agreement or obligation.
13. The unenforceability provision would only apply to sales made after the introduction of the rules and in contravention of those rules. Consumers holding products bought after the introduction of rules incorporating unenforceability provisions would generally need to seek redress through the usual channels of complaints to the firm and to the Financial Ombudsman Service (FOS), or legal action against the relevant firm. However, they would not need to make their case for compensation beyond demonstrating that the agreement or arrangement was the subject of a product intervention rule (whether temporary or not) and that they entered into it after the relevant product intervention rule came into effect.
14. Arrangements made before the introduction of the rules would not be affected by the unenforceability and compensation provisions. Consumers holding contracts made before these rules were in place would still be able to seek redress through the usual channels of complaints to the firm and to the FOS or legal action against the relevant firm. These consumers would need to establish their claim to redress in the usual way, for example by demonstrating that the advice they received was unsuitable, or that they bought the product after receiving a misleading financial promotion.

12 'A relevant agreement or obligation' means:

- a) a specified agreement;
- b) an agreement entered into in contravention of any rule made as a result of paragraph 2.3 (c) or (d);
- c) an obligation to which a person is subject as a result of exercising a right conferred by an agreement within paragraph (a) or (b) of this footnote.

Temporary product intervention rules

15. The FCA is normally obliged to consult the public before making any rules. However, FSMA provides a general exemption (Section 138L) to this requirement if the FCA considers that the delay involved in complying with the requirement would be prejudicial to the interests of consumers.¹³ In addition to the general exemption, a specific exemption to the consultation requirement is provided (Section 138M) in relation to the making of temporary product intervention rules. The FCA may make rules about product intervention without consultation if it considers that it is necessary or expedient not to comply with such requirement to advance:
 - a) the consumer protection objective;
 - b) the competition objective; or
 - c) if the Treasury makes such an order, the market integrity objective.
16. The FCA's discretion to act under Section 138M is therefore wider than under Section 138L. However, unlike the power to make permanent rules under Section 138L, the FCA's exemption to act without consultation under Section 138M is limited to one year.
17. Decisions to make any rules, including temporary product intervention rules, will be taken by the FCA Board. In doing so, the FCA Board will have regard to all the available evidence, as well as to the relative intrusiveness or impact of the measure to be introduced by the proposed rule. The FCA Board will consider whether the evidence is sufficient to support the proposed measure and whether the measure is a proportionate response to the issue identified.
18. In publishing temporary product intervention rules, the FCA will also publish the rationale for these rules.

Factors the FCA will consider when making temporary product intervention rules

19. In general terms, the FCA will consider a product intervention rule where it identifies a risk of consumer detriment arising from a particular product, type of product, or practices associated with a particular product or type of product. In deciding whether the rule should be made as a temporary product intervention rule, the FCA's main consideration will generally be whether prompt action is deemed necessary in seeking to reduce or prevent consumer detriment arising from that product, type of product or practices. It will also have regard to the other considerations set out below.

¹³ The interests of consumers are defined in s.425A.

General considerations for product intervention rules

20. In addition to above, in making temporary (or indeed permanent) product intervention rules, the FCA will have regard to the regulatory principles set out in FSMA (Sections. 3B – see below) and to general considerations that include, but are not limited to, whether the proposed rules are:
- a) an appropriate and effective means of addressing actual or potential consumer detriment associated with a particular product or group of products;
 - b) a proportionate and deliverable means of addressing actual or potential detriment;
 - c) compatible with the FCA's duty to promote effective competition in the interests of consumers (s. 1B(4));
 - d) supported by sufficient and appropriate evidence;
 - e) transparent in their aim and operation; and
 - f) likely to be beneficial for consumers, when taken as a whole.
21. The FCA will also consider the risk that the rules have a negative impact on protected groups in the Equality Act and whether the rules can promote equality and good relations.

Contextual considerations for product intervention rules

22. In considering whether to make temporary (or indeed permanent) product intervention rules in response to an identified product-centred issue, the FCA will generally consider factors such as:
- a) the potential scale of detriment in the market – issues involving products with a large or potentially large customer base are more likely to require product intervention;
 - b) the potential scale of detriment to individual customers – issues that may lead to high detriment for individual customers are more likely to require product intervention;
 - c) the social context – issues that may lead to detriment for particular groups of customers (such as, in particular, vulnerable customer groups) are more likely to require product intervention;
 - d) the market context – market mechanisms such as information disclosure and competition do not always work to protect consumers; and
 - e) possible unintended consequences – whether the use of product intervention rules or the timing of the intervention would in itself create undue risk of further

consumer detriment, including harm to existing customers in the market (although this will not necessarily comprise a full cost benefit analysis).

Competition considerations for temporary product intervention rules

23. In making any rule, including temporary or permanent product intervention rules, the FCA will seek to promote effective competition in the interests of consumers where doing so is compatible with its consumer protection objective (or the integrity objective). In addition to this duty to promote competition (Section 1B(4)), the FCA has a competition objective (s.1E) and may make rules, including temporary product intervention rules, specifically to advance competition.
24. Relevant competition-related considerations for the FCA in the context of temporary (or indeed permanent) product intervention rules are likely to include:
- a) whether there is reasonable scope for the rule under consideration to promote effective competition in the interests of consumers, for instance by addressing consumer behaviours that impair their ability to benefit from competition, by reducing information asymmetries or by correcting misaligned incentives;
 - b) whether the rule under consideration may have a negative impact on competition factors such as product innovation and barriers to entry for new market participants;
 - c) whether any negative impact on competition factors is proportionate, having regard to the aims of the rule under consideration;
 - d) whether alternative solutions may deliver the same intended outcome while having a more positive impact on competition; and
 - e) the overall effect of a proposed rule upon the operation of effective competition in the market for financial services, having regard to the interests of consumers.
25. Where promoting competition (further to the duty in Section 1B(4)) would be in conflict with the consumer protection or (if applicable) market integrity aims of a proposed temporary product intervention rule, the consumer protection or market integrity aims will take precedence over competition considerations.

Regulatory principles

26. As with any rule-making exercise, the FCA will have regard to the regulatory principles set out in s. 3B of FSMA when making temporary product intervention rules. These principles are:
- a) the need for the FCA to use its resources in the most efficient and economic way;

- b) the principle that a burden or restriction which is imposed on a person, or on the carrying on of an activity, should be proportionate to the benefits, considered in general terms, which are expected to result from the imposition of that burden or restriction;
 - c) the desirability of sustainable growth in the economy of the United Kingdom in the medium or long term;
 - d) the general principle that consumers should take responsibility for their decisions;
 - e) the responsibilities of the senior management of persons subject to requirements imposed by or under the Act, including those affecting consumers, in relation to compliance with those requirements;
 - f) the desirability, where appropriate, of the FCA exercising its functions in a way that recognises differences in the nature of, and objectives of, businesses carried on by different persons subject to requirements imposed by or under this Act;
 - g) the desirability in appropriate cases of the FCA publishing information relating to persons on whom requirements are imposed by or under this Act, or requiring such persons to publish information, as a means of contributing to the advancement by each regulator of its objectives;
 - h) the principle that the FCA should exercise their functions as transparently as possible.
27. As part of the FCA's consideration of issues including the desirability of facilitating innovation, it will consider the potential deterrent effect on entry and innovation when making temporary product intervention rules against the potential for reducing anticipated consumer detriment.

Process for the making of temporary product intervention rules

28. Temporary product intervention rules will follow the process for high impact policy issues.
29. Once initial proposals have been discussed, a paper will be prepared at working group level for a committee (the Committee) with appropriate authority to propose temporary product intervention rules to the FCA Board.

Taking policy proposals to the Committee and the Board

30. The Committee will elect one of the Chief Executive Officer, a member of the Executive Committee or the Director of Conduct Policy to act as Chair at each meeting.

31. The Committee will either give the go-ahead to take the proposals to the Board, or suggest rethinking the proposals and coming back at a later date, a decision may be taken to use a different regulatory tool, or a decision will be taken not to proceed.
32. If the Committee decides to take the proposals to the Board, the paper will be taken to the monthly scheduled Board meeting, but if the matter is of great importance or there is an emergency, the Board may convene specifically to consider this issue.
33. If the Board makes a decision to act on the policy proposals, the FCA will publish the temporary rules on its website and take the necessary follow-up actions.

EU considerations

34. The Committee and the FCA Board will consider how the national approach fits within the wider EU legislative framework in their discussions.
35. Where appropriate, the Committee and the Board will recommend consideration of the same issues at EU level.

Informing the Panels

36. There are three Panels: the Practitioner Panel, the Consumer Panel, and the Smaller Business Practitioner Panel. The Panels represent the interests of consumers and practitioners by advising, commenting and making recommendations on existing and developing FCA policies and practices. The FCA will generally seek their views during the process for making temporary product intervention rules if there is sufficient time to do so.

Consulting the PRA

37. The FCA will discuss any proposed product intervention rule (whether temporary or not) with the Prudential Regulation Authority (PRA) and give its comments due weight and consideration before making the rule.

Communication of temporary product intervention rules

38. Before making a temporary product intervention rule, the Committee will consider how affected firms and consumers are to be informed of the rule in good time.

Publication of temporary product intervention rules

39. The FCA will publish a statement on its website explaining why it is introducing the rule. It may choose to invite feedback, but this will not amount to a consultation exercise.

Post-implementation review of temporary product intervention rules

40. The FCA may choose to review a temporary product intervention rule during the term for which the rule is in force. Such a review will generally depend on the perceived risk the rule seeks to mitigate. These reviews may be informed by market monitoring and feedback from stakeholders, including product providers, distributors and consumers.
41. Where the FCA perceives potential uncertainty about how the rule operates, it may consider publishing guidance.
42. Reviews are likely to consider whether a rule is functioning as intended, including whether:
- a) there have been any breaches of the rule;
 - b) there are any unintended consequences, such as an impact on products that were not intended to be caught by the rule;
 - c) there is evidence suggesting firms are working around the rule rather than complying with it, for instance where new products enter the market or new features are added to existing products that expose customers to the same or similar potential detriment; or
 - d) new evidence demonstrates that the rule is not necessary or customer detriment is unlikely.
43. As a result of these reviews, where necessary, the FCA may:
- a) revoke a temporary product intervention rule; or
 - b) where a rule specifies certain criteria under which the sale of a product may continue, change these criteria.
44. Subsequent changes to a temporary product intervention rule will be communicated by issuing a new statement containing the revised rule and the rationale for the changes. Such changes will not extend the lifespan of the temporary product intervention rule.
45. However, the FCA may consult on a new rule to replace the temporary product intervention rule from the date on which the temporary rule ceases to have effect. This exercise would be subject to the FCA's standard rule-making exercise, including market failure analysis, cost/benefit analysis and consultation to which all stakeholders, including providers, distributors and consumers would be invited to reply.

Revocation or replacement of rules

46. When making temporary product intervention rules, the FCA will state the duration of the rule and the date from which it will be effective. Temporary product intervention rules will have a maximum duration of 12 calendar months from when the rule is made, but the FCA may decide on a shorter duration for a rule.
47. The FCA may review or revoke temporary product intervention rules at any time before the end of the period for which they apply.
48. Rules may be revoked or changed for a number of reasons, including but not limited to:
- a) new rules are introduced on a permanent basis following a consultation exercise;
 - b) new rules being introduced at the EU level;
 - c) industry initiatives are developed that specify sufficient minimum standards to address the sources of consumer detriment;
 - d) further evidence is submitted that demonstrates that consumer detriment will not occur;
 - e) demand for, or supply of, the relevant product disappears and is deemed unlikely to return; or
 - f) the FCA identifies unforeseen negative effects of the rule which outweigh any positive impact upon consumer protection.
49. Where temporary product intervention rules have been made, the FCA may not make further temporary product intervention rules containing the same, or substantially the same, provisions within a prohibited period. This period is 12 months beginning on the day on which the limited duration of the initial rules ends (whether or not the rules were revoked early). The prohibited period does not apply to rules that are not temporary product intervention rules (i.e. rules which have been made subject to consultation, whether or not of a set duration).

4

Next steps

- 4.1 We consider that the Statement of Policy published as part of this Policy Statement meets the requirement for the FCA to publish a Statement of Policy on its use of Temporary Product Intervention Rules under Section 138N of FSMA (as modified by the Financial Services Act 2012).
- 4.2 The FCA will come into being on 1 April 2013. From this date onwards, it may consider making temporary product intervention rules, using the process set out in the SoP.
- 4.3 The FCA may consider making revisions to the SoP in future, as is provided for under s.138N of FSMA (as modified by the Financial Services Act 2012). The FCA may for instance make changes to the SoP as a result of issues that are brought to its attention, from its experience of using the process, or resulting from a review of the SoP. Where the FCA makes revisions to the SoP which it deems to be significant, it will consult on these revisions in the normal way. It will publish minor changes or points of clarification on its website.

Annex 1

List of non-confidential respondents

Aegon

AIG

Association for Financial Markets in Europe

Association of British Credit Unions

Association of British Insurers

Association of Financial Mutuals

Association of Private Client Investment Managers and Stockbrokers

Association of Professional Financial Advisers

Barclays

BlackRock

British Bankers' Association

Building Societies Association

Citizens Advice

Consumer Council NI

Consumer Finance Association

Co-operative Banking Group

Council of Mortgage Lenders

Credit Action

Darlington Building Society
Direct Marketing Association (UK)
Enova
Finance and Leasing Association
Financial Ombudsman Service
Financial Services Consumer Panel
Futures & Options Association
International Underwriting Association
Investment and Life Assurance Group
Investment Management Association
Lloyd's
Lloyds Banking Group
Lloyds Market Association
Lockton Companies LLP
Liverpool Victoria
Financial Services Practitioner Panel
PricewaterhouseCoopers
RBS plc
RSA plc
Smaller Businesses Practitioner Panel
Society of Pension Consultants
StepChange
SVG Investment Managers Ltd
Tesco Bank
UK Cards Association
Which?

PUB REF: 04645

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