THE FINANCIAL SERVICES PRACTITIONER PANEL

RESPONSE TO FSA CONSULTATION PAPER 12/35

'THE FCA'S USE OF TEMPORARY PRODUCT INTERVENTION RULES'
DECEMBER 2012

04 FEBRUARY 2013

Introduction

The Financial Services Practitioner Panel has taken a keen interest in the publication of CP 12/35, 'The FCA's use of temporary product intervention rules' ('TPIRs'). The ability to make temporary product rules is a significant new power being granted to the FCA, and we welcome the regulator's consultation on how it should be used in practice. We have provided our detailed comments below.

Executive Summary:

- The Panel welcomes the intention only to use this power in exceptional circumstances, and to first seek industry-led solutions wherever possible
- We believe that the use of this power should be subject to greater accountability and transparency
- The Panel would not agree with the regulator creating TPIRs solely on the grounds that a product provided poor value for money
- We believe that more could be done in terms of communicating with the firms directly affected by the rules

Detailed response:

1. The Panel welcomes the intention only to use this power in exceptional circumstances, and to first seek industry-led solutions wherever possible

The Practitioner Panel understands the rationale for product intervention, and for the regulator being granted the power to create temporary product rules where there is a risk of significant consumer detriment which requires urgent action. This is in line with the regulator's more pro-active and interventionist approach to regulation as also outlined in the FCA approach document.

We do however agree with the consultation paper that this power should only be used as a last resort, where a lack of intervention would lead to unacceptable levels of detriment, and that whenever possible the FCA should conduct a full market impact and Cost-Benefit Analysis and ensure it consults with industry as a whole.

We welcome the intention to consult the Panels when creating such rules. We do have some concern however, regarding the caveat that the regulator will 'generally seek [the Panels'] views…if there is sufficient time to do so'. Whilst recognising that the power to make TPIRs will be utilised in situations where there is time pressure, the Panels have in the past always been flexible in responding promptly to urgent issues on which the regulator needs input. We would be concerned not to be consulted in the creation of rules that could have a very significant impact on the market. It is crucial to recognise the risk to products, markets and consumers if the rules are not appropriately drawn. The Panel could provide senior industry expertise and comment to advise the regulator on likely market reactions and help to mitigate the risks of unintended consequences and unnecessary costs to consumers, regulators and firms.

2. We believe that the use of this power should be subject to greater transparency and accountability

As per above, the Panel agrees with the regulator that TPIRs should only be used in instances where the absence of urgent intervention would cause significant consumer detriment. However the paper does not suggest how 'significant' detriment should be defined or even identified. Ideally, we believe such a measure should be provided.

Even in the absence of such a measure, the FCA could provide greater transparency on its use of this power through publishing an annual report on the creation of TPIRs. Such publication would be in line with the regulator's previously stated intention to be more transparent going forward, and would have the advantage of not being subject to immediate time constraints. In our view, such a report should:

- Reassure markets that intervention powers are being utilised in an appropriate manner

- Provide markets with information about current areas of concern for the supervisor

- Act as a consolidated source of information for any subsequent review/assessment of intervention powers

The Panel is also concerned that the consultation document contains no reference to recourse if the original temporary rules are later found to be inappropriate or unfair. Whilst we welcome the inclusion of a section discussing how the FCA could conduct post-implementation reviews of the power, we don't believe this goes far enough. There needs to be a discussion regarding what redress is/should be available to firms and consumers should the regulator find it has used a power inappropriately and inadvertently caused detriment.

Further, we believe that greater clarity is needed as to the process for how the FCA will decide to intervene. It remains uncertain how long the regulator would take, from having identified a problem and liaised with industry to find a solution, to intervening in the market. We would welcome greater detail on how much work will be done by the regulator, prior to creating TPIRs, to establish a case for intervention, and how much notice would be given to firms that this is to take place.

3. The Panel would not agree with the regulator creating TPIRs solely on the grounds that a product provided poor value for money

We agree with the consultation paper that it would not be practical or possible to predict every circumstance in which the FCA might make these rules, and recognise that the potential scenarios discussed in the paper are not comprehensive.

However, we have concerns regarding the statement that the FCA may choose to use TPIRs in cases where it identifies a product as providing poor value for money. Although we agree this can sometimes be an indicator of consumer detriment, it would be worrying to have the regulator act purely on the basis that it believes a product is poor value. We are aware that the regulator has previously stated its intention to move more in this direction, however the government has also expressly stated it does not intend for the FCA to become an economic regulator. In our view, such developments are concerning, as public statements around possible interventions in this area may deter firms from investing in new products and product lines out of fear that the FCA will 'regulate away' profits. Much greater clarity is needed on what the regulator means when it says that it will intervene on low value for money products, and how this would be determined. The regulator should also consider its communication strategy on this issue, as we believe public statements on this topic may already be having a market impact.

4. We believe more could be done in terms of communicating with the firms directly affected by the rules

Although we support publishing TPIRs on the FCA's web-site, we are concerned that this may not be sufficient to inform all firms affected by the change in rules. As there will be a number of firms involved across the value chain – both as product producers and distributors, and given the possibility of unenforceability provisions being incorporated in the rules, it is key to ensure that all relevant parties are made aware of regulatory changes and how it will impact them. As such, we would urge the regulator to re-consider whether to also contact firms directly, perhaps through Dear CEO letters to all firms carrying the relevant permissions, should it create TPIRs.

We also believe that the regulator needs to ensure it is as specific as possible as to which product features/issues it objects to when creating TPIRs, and communicate these concerns clearly to the market. Different providers offer products that may have a number of similar features, but are not identical. In order for industry to understand which products would be caught by a TPIR, it is essential for the regulator to be clear about the exact product features being targeted for intervention.

Conclusion

In summary, the Panel is supportive of a number of aspects of the proposed approach, including the intention to consult with the Panels, to use the TPIRs power only sparingly and only in cases of potentially significant detriment, and to seek industry-led solutions first. However, we believe greater clarity is required in a number of areas, including the transparency and accountability mechanisms that should attach to the use of this power, how poor value for money in products should be determined by the regulator, and the manner in which firms will be informed when a new rule is created.