

Publishing information about enforcement warning notices

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In this Policy Statement we report on the main issues arising from Consultation Paper 13/8 (*Publishing information about enforcement warning notices*) and publish the final guidance.

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Abbreviations used in this paper

CBA	Cost Benefit Analysis
CEO	Chief Executive Officer
CP	Consultation Paper
DEPP	The Decision Procedure and Penalties Manual
EG	The Enforcement Guide
FCA	Financial Conduct Authority
FSMA	Financial Services and Markets Act 2000
RDC	Regulatory Decisions Committee

1. Overview

Introduction

- 1.1** We are publishing our policy for publishing information about enforcement warning notices, and providing our response to the feedback to our consultation.

Who does this affect?

- 1.2** This Policy Statement will be of interest to all FCA-regulated firms.

Is this of interest to consumers?

- 1.3** As our policy concerns the transparency of our enforcement process, it is likely to be of general interest to consumers.

Context

- 1.4** Our policy will, in particular, advance our consumer protection and integrity objectives. By publishing earlier information about our enforcement action both the financial services industry and consumers will be able to understand the types of behaviour we consider unacceptable at an earlier stage. In turn, this will strengthen our continuing enforcement strategy of credible deterrence.
- 1.5** We now have the power to publish such information about the matter to which a warning notice relates as we consider appropriate. This is because the Financial Services Act 2012 amended section 391(1)(c) of FSMA. The power only applies to warning notices listed under section 391(1ZB) FSMA. These are disciplinary outcomes, for example, where we are proposing to censure, fine or suspend a firm or individual. In the FSA's Consultation Paper 13/8: Publishing information about enforcement warning notices we explained our policy proposals for how we would use this new power. We proposed to include the policy in Chapter 6 of our Enforcement Guide (EG) alongside our existing policies for publishing statutory notices.

- 1.6** We proposed to publish information about a warning notice in a statement (a warning notice statement). Among other things, this would make it clear that the warning notice is not our final decision. Our proposed policy was that we would normally publish a warning notice statement where we have issued a warning notice to which the power applies. However, as required by section 391(6) FSMA, we would not publish a warning notice 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. Our proposed policy also set out how we would assess whether publication would be unfair.

Summary of feedback and our response

- 1.7** We received 39 responses to the CP (six of them confidential). We are grateful to all those who replied for the comments and suggestions they made. A list of the stakeholders who sent non-confidential responses appears in Annex 1.
- 1.8** In Chapter 2 we summarise the feedback received on our policy proposals and explain our response. Consumer groups were generally supportive of our proposals, welcoming the intention to create a more transparent enforcement process and noting the benefits to consumers. However, industry respondents raised a number of concerns. In particular, they disagreed with the presumption of publication, argued in favour of anonymised statements, had concerns with how we proposed to identify an individual, believed the threshold for determining unfairness was set too high, suggested revisions to the warning notice statement, and thought that the publication of a notice of discontinuance would not be an adequate remedy for any harm caused by publishing the warning notice statement.
- 1.9** We have carefully considered these comments and, as a result, have decided to make a number of changes to our policy. The main changes relate to how we will decide whether it is appropriate to publish information about a warning notice. We recognise there may be situations where we consider it is appropriate to publish details of a warning notice to make the nature of our concerns public, but where we consider it is not appropriate to identify its subject. In this situation, we consider that the interests of transparency will usually make it appropriate to publish an anonymised warning notice statement rather than no information. So we will now consider these two issues separately.
- 1.10** We still believe it will normally be appropriate to publish details of a warning notice. We also expect it will normally be appropriate to identify a firm that is the subject of a warning notice, but not to identify an individual. This is because, after taking into account respondents' comments, we now consider that the potential harm caused to an individual from publication at this stage of the enforcement proceedings will normally exceed the benefits of early transparency, but that this will not normally be the case for firms. However, we consider that there will be circumstances where it is appropriate to identify an individual, and our policy lists some examples of these circumstances.
- 1.11** Other changes include clarifying the benefits of early transparency of enforcement proceedings and slightly lowering the threshold that a person has to meet to demonstrate unfairness. We believe our final policy will promote early transparency of enforcement proceedings and will enable firms and consumers to understand our concerns at an earlier stage, but should reduce the risk that any harm caused to the subject of the warning notice from publication will exceed the benefits of early transparency.

Equality and diversity

- 1.12** One respondent made comments on the equality and diversity impact of our proposals, and requested that we re-consider whether our approach to assessing unfairness could be considered discriminatory. We have therefore considered this point and also whether the changes made to our policy give rise to any equality or diversity issues. We have concluded that our final policy does not give rise to any concerns.

Next steps

What do you need to do next?

- 1.13** You should be aware that we will take this approach in deciding whether to publish any information about an applicable warning notice issued on or after 15 October 2013 – the date of publication of this policy statement.

What will we do?

- 1.14** We will apply our policy for the use of the section 391(1)(c) power for all applicable warning notices issued on or after 15 October 2013 - the date of publication of this policy statement.

2. Warning notice publicity policy

- 2.1** In this chapter we summarise the feedback received on our proposed policy for the publication of information relating to warning notices, and set out our response.
- 2.2** Our policy can be found in chapter 6 of EG. The text of the amendments we are making to EG 6 is set out at Appendix 1. Appendix 1 also includes the text of an amendment we are making to our Decision Procedure and Penalties manual (DEPP).

When we will publish information

- 2.3** In CP13/8¹ we stated that the principal purpose of the new power is to promote early transparency of enforcement proceedings. We added that both the financial services industry and consumers would be able to understand the types of behaviour that we consider unacceptable at an earlier stage. Considering the purpose of the power, and the new regulatory principle that the regulators should exercise their functions as transparently as possible,² we proposed that we would normally publish a statement where we have issued a warning notice to which the power applies. However, we said we would not publish information if any of the section 391(6) grounds apply.
- 2.4** Some respondents agreed that we should normally publish information about warning notices, believing that this would create a more transparent enforcement process that encourages better behaviour by firms and so results in improved outcomes for consumers. Other respondents disagreed. Some thought that our proposed approach was not proportionate, commenting that it does not adequately have regard to the proportionality regulatory principle set out in section 3B(1)(b) FSMA.³ It was argued that FSMA contains no express justification for a default policy of publication without proportional safeguards, and that any decision to publish information should consider the potential harm caused by publication and should be proportionate to that harm.
- 2.5** There were also concerns that our proposed approach does not give us enough discretion to decide when not to publish. One respondent compared the section 391(1)(c) power to publish information about warning notices with the section 391(4) duty to publish information about a decision notice or final notice, commenting that whereas section 391(4) states that the FCA must publish, thus creating a presumption in favour of publication, there is no such statutory presumption under section 391(1)(c).

¹ <http://www.fsa.gov.uk/static/pubs/cp/cp13-08.pdf>

² Section 3B(1)(h) FSMA.

³ Section 3B(1)(b) FSMA states: "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".

- 2.6** Some respondents proposed instead that publication should be the exception rather than the rule, and it should only be used where there is a demonstrable need to do so in order to contribute to the protection of consumers or other statutory objectives. Some thought we should consider the full circumstances of each case before deciding to publish, and should weigh up the benefits against the impact on the person. There were also suggestions that we should specifically take into account additional factors in deciding whether to publish, such as the public need to know, the size of the firm involved and whether firms need to undertake clear actions to address specific issues.
- 2.7** Another argument put forward by respondents was that we could make clear the types of behaviour we consider unacceptable without naming the firm or individual. Several respondents therefore favoured either anonymised publications or a presumption of anonymity, which could only be rebutted if naming the firm or individual was reasonably necessary in the public interest. One respondent thought that a general policy of naming individuals unless the section 391(6) grounds are met cannot be justified as proportionate.

Our response:

We continue to believe that the purpose of the new power justifies an approach of normally publishing information about warning notices. Early transparency of enforcement proceedings has several benefits and, to be clearer, we have amended the policy to highlight some of them:

- Consumers, firms and market users will be able to understand the types of behaviour that we consider unacceptable at an earlier stage, which in turn should encourage more compliant behaviour.
- By showing at an earlier stage that we are taking action, confidence in the FCA and the regulatory system should be enhanced.
- There will be more openness in respect of the enforcement process, which will generally be in the public interest.
- And it aligns the stage at which publicity is given in regulatory cases with the stage at which publicity is given in civil and criminal cases.

Our view is that, given these benefits, it will normally be appropriate to publish details of a warning notice to make public the nature of our concerns. But having considered respondents' views, we recognise there may be situations where it is not appropriate to identify the subject of the warning notice. As a result, we will separately consider whether it is appropriate to identify the subject. So we will take the following steps when deciding whether to publish information about a warning notice:

- i. We will first consider whether it is appropriate to publish details of the warning notice to enable consumers, firms and market users to understand the nature of our concerns. We will consider the circumstances of each case but we expect normally to consider it appropriate to publish these details.

- ii. If we consider it is appropriate to publish these details, we will consider whether it is also appropriate to identify the subject of the warning notice. We will consider the circumstances of each case, although we expect that it normally will be appropriate to identify a firm, but not an individual.
- iii. If we consider it is appropriate to publish either details of the warning notice without identifying the subject, or details of the warning notice including the identity of the subject, we will consult the persons to whom the notice is given or copied.
- iv. We will then consider if any of the section 391(6) grounds prohibiting publication apply.
- v. If, after considering any representations received, we still think it is appropriate to publish information about a warning notice, we will publish the information in a warning notice statement.

Our approach for individuals is different to our approach for firms at the second step because, after taking into account respondents' comments, we now consider that the potential harm caused to an individual from publication at this stage of the enforcement proceedings will normally exceed the benefits of early transparency, but this will not normally be the case for firms. However, this does not mean that we will always consider it inappropriate to identify an individual, and our policy lists examples of circumstances where we consider the identification of an individual would be appropriate. These are where we consider:

- it is not possible to describe the nature of our concerns without making it possible to identify the individual
- it is necessary to avoid other individuals being mistakenly believed to be the individual in breach
- it would help to protect consumers or investors
- it is necessary to maintain public confidence in the financial system or the market, or
- it is desirable to quash rumours in the market

To illustrate how we would apply the policy in practice, here are two examples.

When we would not consider it appropriate to identify an individual

We have given a trader at a bank a warning notice stating that we consider she has committed market abuse and we propose to impose a penalty on her and to prohibit her from performing any role in regulated financial services. We have also given a warning notice to the bank in relation to this matter which states that we propose to impose a penalty on it for having inadequate systems and controls.

In respect of the bank, we would consider it appropriate to publish a warning notice statement containing details of the bank's failings and naming the bank, unless doing so would be unfair (see below). In respect of the individual, we would consider it appropriate to publish a separate warning notice statement containing details of her misconduct. These details would include the name of the bank, as its identity would be clear from the warning notice statement published in respect of the bank's failings. However, it is unlikely that the individual could be identified from these details. So unless any other circumstances apply which would justify identifying the trader, the warning notice statement would not include her name.

When we would consider it appropriate to identify an individual

The individual is the CEO of an authorised firm. We have recently published a final notice in respect of the firm's breach of our rules. We have given the CEO a warning notice stating that we consider he was knowingly concerned in the firm's breach and we propose to impose a penalty on him. We consider it appropriate to publish details of his misconduct. Those details, in combination with the details in the published final notice given to the firm, would make it clear that he is the CEO of, or at least a senior person at, the firm. To avoid other senior persons at the firm being mistakenly believed to be the person in breach we would consider it appropriate to publish a warning notice statement identifying him, unless to do so would be unfair (see below).

So after carrying out the first two steps, our view will either be that it is appropriate to publish details of the warning notice, including the identity of the subject, or that it is appropriate to publish anonymised details of the warning notice, or that it is not appropriate to publish any information. In the first two situations, we will then consult the persons to whom the warning notice is given or copied. In the latter situation, we will not publish any information.

How we will consider whether publication would be unfair

- 2.8** In the CP we stated that, in assessing unfairness, we would consider whether it is a firm or an individual who we are taking action against, and the extent to which they have been made aware of the case against them during the course of the investigation. We also said that we would normally not consider it unfair to publish solely because it is claimed that publication could have a negative impact on a person's reputation. Instead, a person who sought to demonstrate potential unfairness from publication would have to provide clear and convincing evidence of how that unfairness might arise and how they could suffer a disproportionate level of damage.
- 2.9** Our proposed policy also set out the main circumstances in which we would not publish details of a warning notice for unfairness reasons. These were that publication could materially affect the person's 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. We also stated that arguments about the merits of the warning notice itself would not be material to publication decisions.

- 2.10** One respondent said it is not clear how whether the person is a firm or an individual will affect our determination, while some respondents argued that the hurdle for publishing action against an individual should be higher than against a firm. Some respondents were opposed to any publication in circumstances where the person has not been made sufficiently aware of the case against him or has not been given an opportunity to respond to our initial findings.
- 2.11** While a couple of respondents agreed that reputational damage by itself should not always be enough to prevent publication, several respondents thought that it should be given sufficient consideration in every case, with particular concern being raised about the potential for reputational damage to small firms.
- 2.12** More guidance was requested on how we would assess unfairness, including on what is meant by 'clear and convincing evidence' and 'disproportionate level of damage'. Some respondents were concerned with practical issues relating to how a person could demonstrate unfairness, for example, the difficulties of obtaining evidence within 14 days and of providing evidence that publication would lead to a deterioration in health or a loss of livelihood.
- 2.13** One respondent said that, in considering whether publication would be unfair, we should take some account of the fact that the outcome of the proceedings is less certain at this stage, and of the impact on the person concerned of the potentially long period of uncertainty between publication of a warning notice statement and the issue of any final notice or notice of discontinuance.
- 2.14** A couple of respondents agreed with the specified unfairness circumstances, although one thought they are more generous to firms and individuals than in other regulated sectors or in criminal and civil law. We received comments on the scenarios in the CP which illustrated how we would apply the unfairness test. These included concerns that the thresholds 'could materially affect their health' and 'likelihood of insolvency' were too high. However, one respondent was concerned that a firm could use threatened job losses to avoid the publication of a warning notice statement and so recommended that there must be strong evidence of a direct causal link between the publication of a warning notice statement and any proposed redundancies.
- 2.15** We stated in the CP that we would probably publish information where an individual claims that their employer would be likely to dismiss them if details of the warning notice were published, on the grounds that by that stage an employer would normally have decided whether or not to support the individual. One respondent agreed with this statement, but others argued that an employer will not necessarily already have decided whether to support the employee and that their stance could be affected by the publicity.
- 2.16** Some respondents understood why we would not want to consider arguments about the merits of the case, but thought we should do this in certain circumstances. Other respondents argued that the merits of the case should usually be taken into account on the ground that these are material in deciding whether publication might be unfair, since the weaker the case the higher the risk that unnecessary reputational damage will be caused.
- 2.17** Some respondents commented that the CP only focuses on the unfairness test and does not expand on the other section 391(6) grounds. They requested that we publish scenarios of situations in which these provisions would be used to illustrate how they would work in practice.

Our response:

If, before consulting the persons to whom the warning notice is given or copied, we consider that any of the section 391(6) grounds clearly apply, we will take this into account when carrying out our initial assessment of what information, if any, it is appropriate to publish. However, our main assessment of whether publication would be unfair to the subject of the warning notice, or whether any of the other section 391(6) grounds prohibiting publication apply, will take place after we have consulted the persons to whom the warning notice is given or copied so that we will be able to take into account any representations they make. We expect that in practice these representations will normally focus on the issue of fairness, although we will also take into account representations that it would be inappropriate for other reasons to publish information about the warning notice.

We believe that publishing information about a warning notice would rarely be prejudicial to the interests of consumers or detrimental to the stability of the UK financial system. So, while we will still consider if either of these grounds could apply, our policy focuses on how we will assess whether publication would be unfair.

In assessing unfairness, as we mentioned in the CP, we will take into account the extent to which the person has been made aware of the case against them during the course of the investigation. Our usual practice is to send the subject of an investigation a preliminary findings letter annexing the investigators' preliminary investigation report, and to give them a reasonable period (normally 28 days) to respond, before we decide whether to issue a warning notice. As we already explain in EG 4.31, there may be some circumstances where we decide it is not appropriate to send out a preliminary findings letter. In those situations, we will have regard to all the circumstances of the case when considering whether publishing a warning notice statement would be unfair.

Whether the subject of the warning notice is a firm or an individual will also continue to be relevant to our assessment of unfairness. Our presumption that it will not normally be appropriate to identify an individual is based on our view that the relative harm from publication is likely to be greater for an individual than for a firm and, in line with this, our expectation is that it would be more difficult for a firm to demonstrate unfairness than an individual. We will also have regard to the size of a firm. We consider this is a relevant consideration because the impact of publication on a small firm is likely to be of a different nature to the impact on a large firm, and in some cases could resemble the impact on an individual. So we expect that larger firms will find it more difficult to demonstrate unfairness than smaller firms.

In order to demonstrate potential unfairness from publication, we still require a person to provide clear and convincing evidence of how that unfairness may arise and how they could suffer a disproportionate level of damage. We explained in Policy Statement PS13/5⁴ why the decision to publish a warning notice statement needs to be taken early in our Regulatory Decisions Committee (RDC) proceedings and therefore why we consider that a period of 14 days for providing evidence is appropriate. We recognise that it may not always be straightforward to obtain the required evidence, but such evidence is necessary if we are to be satisfied that publication would be unfair.

However, after taking into account respondents' comments, we have slightly lowered the threshold a person has to meet to show that publication could cause them a disproportionate level of damage. A person must still show that publication could have a material effect on them, but we now consider that this is likely to be the case if publication could result in a significant loss of income rather than a disproportionate loss of income, which was the threshold proposed in the CP. We have also amended the policy to provide examples of disproportionate damage, rather than an exhaustive list. The examples in the policy are that publication could materially affect the person's health, result in bankruptcy or insolvency, a loss of livelihood or a significant loss of income, or prejudice criminal proceedings to which they are a party. These changes do not affect our conclusions in respect of the scenarios mentioned in the CP.

We have also considered the points raised by respondents on reputational damage and have amended the policy to clarify that, while we are not ruling out the possibility that reputational damage by itself will be enough to prevent publication, we are more likely to consider that the negative impact of publication on a person's reputation amounts to unfairness if the person also provides evidence of the harm that they would suffer as a consequence of the damage to their reputation.

We have slightly amended the policy to make it clear that arguments made solely on the basis that it is unfair for the FCA to have the power to publish information at this point of the enforcement process will have no effect on our decision. And our view remains that arguments about the merits of the warning notice will not be material to publication decisions. As we mentioned in the CP, 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.

The considerations that we will take into account when deciding what information to publish about a warning notice, including whether publication would be unfair, recognise that we have a discretion as opposed to a duty to publish and that the recipient of a warning notice has not yet had a formal opportunity to make representations about the action we propose to take. The position is different in respect of the publication of decision notices and final notices, and so our policy for publishing these notices remains unchanged. New EG 6.7A points out the contrast between our approach to publishing information about warning notices and our approach to publishing decision notices and final notices.

⁴ <http://www.fsa.gov.uk/static/pubs/policy/ps13-05.pdf>

What we will publish

- 2.18** In CP13/8 we said that we would publish information in a statement which would normally contain sufficient information to identify the firm or individual and to enable consumers, firms and market users to understand the nature of our concerns. However, we said that we would not normally publish the nature and level of the proposed disciplinary sanctions.
- 2.19** In cases where we publish a warning notice statement and then subsequently decide not to take any further action, we said that we would make it clear on our website that the warning notice no longer applies. We said that we would normally do this by publishing a notice of discontinuance, providing the recipient consents.
- 2.20** As mentioned above, some respondents argued that the warning notice statements should be anonymised. Where warning notice statements are not anonymised, many respondents agreed that they need to contain sufficient information to allow the subject of the enforcement proceedings to be identified. However, where the subject is an individual, concerns were raised about proposals to publish personal details such as the individual's date of birth or home address.
- 2.21** Respondents mostly agreed that the warning notice statement should contain sufficient information to enable consumers, firms and market users to understand the nature of our concerns. The majority of respondents also agreed with the reasons given in the CP as to why we would not normally publish details of the sanction proposed.
- 2.22** We received comments on the proposed wording of the warning notice statement. Some of these were positive, for example, the prominence given to the section which highlights that a warning notice is not the final decision of the FCA was considered helpful. Others raised concerns, including that the description of the disciplinary process is too detailed for consumers; that the statement contains more information than is necessary to achieve transparency; that more contextualisation is needed to allow consumers to properly understand the issue; and that it is not sufficiently clear that a final decision has yet to be made. Respondents made various recommendations on how the statement could be revised, including that we should publish a shorter, clearer message in plain and simple language, and that we should emphasise that the notice and findings of fact are provisional.
- 2.23** We were also asked about the publication of the statement, and received suggestions that this should be managed carefully with statements issued to the media in a way which avoids exaggeration or confusion. One respondent also asked what information would be included on the Financial Services Register and when we would consider it appropriate to include this information.
- 2.24** Respondents also commented on our proposal to publish a notice of discontinuance if, after publishing a warning notice statement, we subsequently decide not to take any further action. While some respondents thought this would be a welcome safeguard, many others thought this would not be an adequate remedy for the harm caused, for example, because it would not attract the same attention as the original statement. To mitigate this concern, many respondents thought the notice of discontinuance should be publicised in the same manner as the original warning notice statement. Some respondents also thought that we should take down the original warning notice statement, while one asked how we would modify it to make it clear that the action was later discontinued.

- 2.25** Respondents also asked to see an example of the notice of discontinuance wording in the Policy Statement. Many respondents thought that simply publishing a notice of discontinuance in the current format is inadequate, and that instead it should contain sufficient detail to enable consumers, firms and market users to understand that the nature of our concerns has been allayed. One firm argued that the notice should include an explanation of our decision to discontinue proceedings, which they thought would provide greater transparency of the enforcement process.
- 2.26** We were also asked about the approval process for publishing a notice of discontinuance, whether we would issue any sort of apology with the notice of discontinuance, whether any compensation would be given to those who had suffered harm as a result of the publication of the warning notice statement, and in what circumstances, other than refusal to give consent, would we not publish a notice of discontinuance.

Our response:

As we proposed in the CP, we will publish information about a warning notice in a warning notice statement. However, we have amended our policy to make it clear that we will only identify the person in the warning notice statement where we think it is appropriate to do this. We have also removed from the policy the examples of how we would identify a firm or an individual. We are considering further how to identify an individual in a way which avoids other persons being mistakenly believed to be the person in breach, but which is also not overly intrusive. The chosen method in a particular case will be apparent from the draft warning notice statement sent to the subject of the warning notice, so they will have the opportunity to make representations on it.

Where we think it is appropriate to publish details of the nature of our concerns, but not to identify the person, the warning notice statement will not include the person's name or any other information which we believe could identify them. Instead it will say 'a firm' or 'an individual' or, where appropriate, the type of person, for example, 'a bank' or 'a trader'. Where we decide not to identify an individual who, at the time of their misconduct, worked for an authorised person, we will also consider whether to mention the name of that firm, taking into account relevant factors such as whether there is a reasonable possibility that this could lead to the individual being identified or to others being mistakenly identified as the person in breach. Otherwise, while the details we include about the person's misconduct will depend on the facts of the case, the wording of the warning notice statement will continue to be consistent with the examples included in the CP. We believe the statement will allow consumers, firms and market users to understand the nature of our concerns. We also consider that the description of the disciplinary process contains an appropriate amount of detail and makes it clear that a warning notice is not the FCA's final decision on the matter.

We have retained the statement in the policy that we will consider what information about the matter should be included on the Financial Services Register.

We have noted respondents' concerns that the publication of a notice of discontinuance may not be an adequate remedy for any harm caused in the interim, in particular if it is not publicised in the same manner as the original

warning notice statement. To mitigate these concerns, we will aim to publicise the notice of discontinuance in the same way as the original warning notice statement, which will include the issue of a press release where relevant.

We do not think it is appropriate to take down a warning notice statement where we subsequently issue a notice of discontinuance as this would not be consistent with our objective of increasing the transparency of our enforcement action. Instead, we will amend the warning notice statement so that it includes a prominent message that a notice of discontinuance has subsequently been given, and a link to that notice of discontinuance.

We do not consider it appropriate to include an explanation of why we have decided to discontinue proceedings in a notice of discontinuance. The wording we will use is likely to be along the following lines:

“On [date] the FCA published a statement [link to that statement] that it had given [name of firm/individual] a warning notice on [date] proposing to take action in respect of the conduct summarised in that statement. Following further consideration, the FCA has decided to take no further action against [name of firm/individual] in relation to this matter.”

Where the warning notice statement does not identify the subject of the warning notice, it is more likely that the subject will not consent to the publication of a notice of discontinuance. In those circumstances, we will add a prominent message to the anonymised warning notice statement which will make it clear that our action has been discontinued.

Another situation in which we may not publish a notice of discontinuance, other than where a person refuses consent, is where, despite our best efforts, we are unable to notify the person of the decision.

The decision to publish a notice of discontinuance will be an executive decision made by FCA staff rather than by the RDC. We do not think it is appropriate to issue an apology or offer compensation; if a person wishes to complain about our actions, they can make a formal complaint through our Complaints Scheme.⁵

Other comments

- 2.27** We also received some comments which were not concerned with the details of our proposed policy. These included comments on whether the new power should ever have been introduced: consumer groups were strongly in favour while industry respondents mostly thought that the benefits of early transparency would mostly be outweighed by the potential for reputational harm. One respondent commented that the Cost Benefit Analysis (CBA) in the CP did not address the possibility that our policy could lead to an increase in litigation action and costs.
- 2.28** Some respondents requested that the Policy Statement include statistics on how many warning notices issued by the FSA have been followed by notices of discontinuance. One respondent

⁵ www.fca.org.uk/about/governance/complaining-about-us

thought we should publish an account of how we have used the power, while another respondent thought we should give details of the number of warning notices which we had not publicised.

- 2.29** There were a number of comments on our procedure for deciding whether to publish a warning notice statement. These included a suggestion that the RDC should give reasons for its decision to publish and that these should be published for transparency purposes.

Our response:

In the CP, we explained that as the changes we proposed to make to EG do not relate to rules a CBA is not required by FSMA, but we did consider the impact of our proposals. We have considered whether any material changes should be made to the CBA set out in the CP in the light of the changes we have made to the policy. The main changes to the policy are that it now contains a presumption that it will not be appropriate to identify an individual who is the subject of enforcement action, and that it now allows for the publication of anonymised details. Where we consider it is not appropriate to identify an individual, it is less likely that they will make representations about the contents of the warning notice statement. So the potential costs outlined in the CP are likely to be slightly lower.

In the CP, we described the principal benefits as greater and earlier transparency of the FCA's enforcement process. We said that this additional transparency 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. Our changes to the policy will reduce transparency where we do not identify the subject of the enforcement action. However, firms will still gain greater and earlier clarity over conduct that we consider is unacceptable. This benefit is not affected by not naming the subject of enforcement action. Further, in most instances, firms subject to warning notices will be named which will help consumers make more informed decisions. So we believe our changes have not materially affected the expected benefits of the policy.

We also consider that the changes we have made to the policy do not materially affect the Compatibility Statement included in the CP.

Every year we publish an Enforcement Annual Performance Account which summarises our Enforcement division's activities and achievements over the previous 12 months. In this year's report we mentioned that our desire to be a more transparent regulator had influenced its contents and that we would consider what further information it would be useful to publish in future reports. We recognise that there is likely to be interest in the extent to which we have used the new power to publish information about enforcement warning notices and so we will consider what information to include regarding its use in future reports.

Between 1 April 2010 and 31 March 2013 we issued 102 enforcement warning notices. This excludes warning notices issued in cases which relate to the cancellation of an authorisation and threshold conditions cases as we do not have the power to publish information about these warning notices.⁶ As at 31 March 2013, a decision notice had been issued in 84 of these cases, a notice of discontinuance had been issued in 3 of these cases and the RDC was still considering the matter in 15 of these cases. The proportion of enforcement warning notices which were followed by a notice of discontinuance rather than a decision notice was therefore 3 out of 87 (3.4%). Table A shows the breakdown of these figures for each of these financial years.

Table A

Year	No. of warning notices issued	No. of decision notices issued⁷	No. of cases discontinued⁸	No. of cases outstanding⁹
2010-11	43	38	1 ¹⁰	4
2011-12	37	36	1 ¹¹	0
2012-13	22	10	1 ¹²	11

To make the procedure that we will follow when publishing information about warning notices clearer, we have amended DEPP 3.1.14F to add that, if the RDC decides that the FCA should publish a warning notice statement, the RDC will notify the relevant parties in writing of that decision. When it makes this notification the RDC will give reasons for its decision. We do not think it is appropriate to publish these reasons as they could be prejudicial to the person, for example, if the RDC decided it did not believe the person's claim that publication would damage their health.

⁶ In contrast, the statistics published by the FCA in relation to the RDC's activity, including in relation to the number of cases withdrawn by the executive, do include these figures: www.fca.org.uk/your-fca/documents/statistics-of-regulatory-decisions-committee-activity.

⁷ The number of warning notices issued in that financial year which, by 31 March 2013, had been followed by the issue of a decision notice.

⁸ The number of warning notices issued in that financial year which, by 31 March 2013, had been discontinued before a decision notice was issued.

⁹ The number of warning notices issued in that financial year which, by 31 March 2013, had not been followed either by a decision notice or a notice of discontinuance.

¹⁰ In the 2010/11 Enforcement Annual Performance Account we said that in 2 out of 42 disciplinary cases we issued a warning notice that was not followed by a decision notice. That figure was incorrect. It included a notice of discontinuance issued in 2010/11 but in respect of a warning notice issued in 2009/10, which is why table A only states that 1 notice of discontinuance was issued in respect of warning notices issued in 2010/11. It also omitted a warning notice issued that year and included the warning notices in the four cases which are still outstanding.

¹¹ In the 2011/12 Enforcement Annual Performance Account we stated that in 1 out of 25 disciplinary cases we issued a warning notice that was not followed by a decision notice. The difference between this figure and the Table A figure is that the Table A figure includes decision notices issued in 2012/13 in relation to warning notices issued in 2011/12.

¹² In the 2012/13 Enforcement Annual Performance Account we stated that in 1 out of 23 disciplinary cases we issued a warning notice that was not followed by a decision notice. The difference between this figure and the Table A figure is that this figure includes decision notices issued in 2012/13 in relation to warning notices issued in 2011/12.

Annex 1:

List of non-confidential respondents

Advanced Insurance Centres Ltd

Association of Private Client Investment Managers and Stockbrokers

Association for Financial Markets in Europe

Association of British Insurers

Association of British Credit Unions

Association of Professional Financial Advisers

Building Societies Association

Chartered Institute for Securities & Investment

Citizens Advice Bureau

Direct Line Group

Employment Lawyers Association

Futures and Options Association

Financial Services Consumer Panel

FCA Small Business Practitioner Panel

FCA Practitioner Panel

GC100 Group

HSBC

International Financial Data Services

Investment and Life Assurance Group

Individual

Kingsley Napley LLP

Lloyd's Market Association

Money Savings Expert

Northern Ireland Consumer Council

NYSE EURONEXT

Phoenix Group Ltd

Royal Sun Alliance

Santander

Thompson Heath and Bond Limited

The City of London Law Society

UBS AG

Withers LLP

Which?

Appendix 1: Made rules (legal instrument)

ENFORCEMENT GUIDE (WARNING NOTICES PUBLICITY) INSTRUMENT 2013

Powers exercised by the Financial Conduct Authority

- A. The Financial Conduct Authority makes this instrument in the exercise of the following powers and related provisions of the Financial Services and Markets Act 2000:
- (1) section 139A (Power of the FCA to give guidance); and
 - (2) section 395 (The FCA's and PRA's procedures).

Commencement

- B. This instrument comes into force on 15 October 2013.

Amendments to the Handbook

- C. The Decision Procedure and Penalties manual (DEPP) is amended in accordance with Annex A to this instrument.

Amendments to the Enforcement Guide

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

Citation

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

By order of the Board of the Financial Conduct Authority
26 September 2013

Annex A**Amendments to the Decision Procedure and Penalties manual (DEPP)**

In this Annex, underlining indicates new text and striking through indicates deleted text.

3.2.14F G If the *RDC* decides that the *FCA* should publish a warning notice statement:

(1) the *RDC* will notify the relevant parties (including the relevant *FCA* staff) in writing of that decision;

~~(1)~~ the *RDC* will settle the wording of the warning notice statement; and

~~(2)~~

~~(2)~~ the *FCA* will make appropriate arrangements for the warning notice

(3) statement to be published.

Annex B

Amendments to the Enforcement Guide (EG)

In this Annex, underlining indicates new text and striking through indicates deleted text.

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 *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(6) provides that the *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), prejudicial to the interests of *consumers*, or detrimental to the stability of the UK financial system.

6.7A The *FCA*'s approach to publishing information about *warning notices* is set out in paragraphs 6.7B to 6.7J below. This should be contrasted with the *FCA*'s approach to the publication of *decision notices* and *final notices* as set out in paragraphs 6.8 to 6.9 below. In particular, the considerations that the *FCA* will take into account when deciding what information to publish about a *warning notice*, including whether publication would be unfair, recognise that the *FCA* has a discretion as opposed to a duty to publish and that the recipient of a *warning notice* has not yet had a formal opportunity to make representations about the action the *FCA* proposes to take.

Warning notice statements

6.7B The *FCA* may publish information about *warning notices* which fall within section 391(1ZB) of the *Act*. These are essentially disciplinary *warning notices*, for example, 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*.

6.7C The decisions on 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

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

copied. The procedure the FCA will follow when making these decisions is set out in DEPP 3.

6.7D The principal purpose of this power is to promote the early transparency of enforcement proceedings. This has several benefits, including:

- consumers, firms and market users will be able to understand the types of behaviour that the FCA considers unacceptable at an earlier stage, which in turn should encourage more compliant behaviour;
- by showing at an earlier stage that the FCA is taking action, confidence in the FCA and the regulatory system should be enhanced;
- there will be more openness in respect of the enforcement process, which will generally be in the public interest; and
- it aligns the stage at which publicity is given in regulatory cases with the stage at which publicity is given in civil and criminal cases.

6.7E The FCA will take the following initial steps in considering whether it is appropriate to exercise this power:

- (1) It will consider whether it is appropriate to publish details of the warning notice in order to enable consumers, firms and market users to understand the nature of the FCA's concerns. The FCA will consider the circumstances of each case but expects normally to consider it appropriate to publish these details.
- (2) Where the FCA considers it is appropriate to publish details of the warning notice, it will consider whether it is also appropriate to identify the subject of the warning notice. The FCA will consider the circumstances of each case but expects normally that it will be appropriate to identify a firm, but that it will not be appropriate to identify an individual. This is because the FCA considers that the potential harm caused to an individual from publication at this stage of the enforcement proceedings will normally exceed the benefits of early transparency, but that this will not normally be the case in respect of firms. However, there may be circumstances where the FCA considers identification of an individual is appropriate, for example, where the FCA considers:
 - it is not possible to describe the nature of its concerns without making it possible to identify the individual;
 - it is necessary to avoid other persons being mistakenly believed to be the individual in breach;
 - it would help to protect consumers or investors;
 - it is necessary to maintain public confidence in the financial system or the market; or
 - it is desirable to quash rumours in the market.
- (3) Where the FCA considers it is appropriate either to publish details of the warning notice without identifying its subject, or to publish details of the warning notice and identify its subject, it will consult the persons to whom the notice is given or copied. It will then consider whether any of the grounds set out in section 391(6) of the Act prohibiting publication apply. These grounds are that publication of that information, or some of that information, would, in the opinion of the FCA,

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 considering whether publication would be unfair, the *FCA* will have regard to, amongst other matters, whether the *person* with respect to whom the action was proposed to be taken is a *firm* or an individual, the size of a *firm*, and the extent to which the *person* has been made aware of the case against him during the course of the investigation.

6.7F 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. For example, this may be the case if publication could materially affect the person's health, result in bankruptcy or insolvency, a loss of livelihood or a significant loss of income, or prejudice criminal proceedings to which he is a party. The *FCA* is more likely to consider that the negative impact of publication on a person's reputation amounts to unfairness if the person also provides evidence of the harm that they could suffer as a consequence of the damage to their reputation. Arguments made solely on the basis that it is unfair for the *FCA* to have the power 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 in response to the *warning notice*.

6.7G If, after consulting the *persons* to whom the notice is given or copied, the *FCA* still considers it is appropriate to publish information about a *warning notice*, it will publish this information in a statement (a *warning notice* statement). This will ordinarily include 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. Where the *FCA* considers it appropriate to identify the subject of the *warning notice*, it will also include details of:

- (1) the name of the *firm* or individual;
- (2) additional information to enable the identification of the *firm* or individual;
and
- (3) in the case of an *approved person*, his or her employer at the relevant time.

6.7H 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.

6.7I Any *warning notice* statement the *FCA* publishes 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 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 *Tribunal* which will reach an independent decision on the appropriate action for the FCA to take.

6.7J 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 FCA decision-making; it informs the public and helps to maximise the deterrent effect of enforcement action. The FCA will upon request review warning notice statements, *decision notices*, *final notices* and related press releases that are published on the FCA's website. The FCA will determine at that time whether continued publication is appropriate, or whether notices and publicity should be removed or amended.

...

6.10B The 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 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 FCA will make it clear on its website that the warning notice or the *decision notice* no longer applies. The FCA will normally do this by publishing a ~~discontinuation notice~~ *notice of discontinuance with the consent of the person to whom the notice of discontinuance has been given or copied.*

...

6.12 Publishing the reasons for variations of *Part 4A permission* the imposition of requirements, and maintaining an accurate public record, are important elements of the FCA's approach to its *statutory objectives*. The FCA will always aim to balance both the interests of *consumers* and the possibility of unfairness to the *person* subject to the FCA's action. The FCA will publish relevant details of both fundamental and non-fundamental variations of *Part 4A permission* and requirements which it imposes on *firms*. But it will use its discretion not to do so if it considers this to be unfair to the person on whom the variation is imposed, prejudicial to the interests of *consumers*, or detrimental to the stability of the *UK financial system*. Publication will generally include placing the notice on the FCA website and this may be accompanied by a press release. As with warning notice statements, *decision notices* and *final notices*, *supervisory notices* and related press releases that are published on the FCA's website

will be reviewed upon request. The *FCA* will determine at that time whether continued publication is appropriate, or whether notices and related press releases should be removed or amended. The *FCA* expects usually to conclude that *supervisory notices* and related press releases that have been published for less than six years should not be removed from the website.

Financial Conduct Authority



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