



**THE FCA SMALLER BUSINESS
PRACTITIONER PANEL'S**

**RESPONSE TO FSA CONSULTATION PAPER 13/8
'PUBLISHING INFORMATION ABOUT WARNING NOTICES'**

14 June 2013

1. Introduction

The FCA Smaller Business Practitioner Panel (the 'Panel') has been interested both in the introduction of the powers in s.391(1)(c) of FSMA, introduced by the Financial Services Act 2012, and how the FCA will use this power.

The Panel welcomes the opportunity to provide written comments on the proposed policy on when the FCA will consider it appropriate to make statements regarding the issuance of a warning notice.

Although we had concerns about Parliament introducing this power, we focus our comments here primarily on the FCA's proposed policy of the power's use and illustrative examples of the warning notice statements.

We have provided our detailed comments below.

2. Executive Summary:

In summary, the Panel states:

- warning notice statements will only provide value in a small number of cases (e.g., action against boiler rooms);
- we have significant concern about the impact on the reputation of small businesses and individuals, which should be considered in the decision-making process;
- the proposed wording of warning statements requires reconsideration to ensure it is balanced and useful to consumers.

3. Panel response:

The Panel has previously expressed concern to the regulator about the impact and consequences of the new power under s.391(1)(c) of FSMA to issue statements about warning notices. We appreciate that moves to promote transparency of regulatory processes and enforcement action at a much earlier stage may be beneficial for consumers; however, this must be appropriately balanced against the potential harm that may be done to a business or individual. The Panel would, for example, support the use of the power to warn consumers about harmful, unauthorised investment 'boiler room' operators. However, we would be concerned that the power may be used to damage the reputation of honest firms, where they are able to prove at a later stage that allegations against them were not as serious as suggested, or (possibly) unfounded.

i. Impact for smaller firms

For smaller firms, the Panel has worried that the impact of the use of this power may irreparably damage firms' reputations, create staff redundancies and, ultimately, drive small firms out of business. We were pleased to see this general point noted in the consultation paper. This is especially important given that over 90% of regulated firms are classified as small 'c4' firms. Many of these employ only a small number of staff, serve a small number of clients and operate at relatively low profit levels, without the large cash reserves of larger institutions. Any impact on their reputation or customers' confidence could quickly lead to redundancies or their failure.

For these reasons, we would not support the FCA's stance that a statement should normally be published whenever a warning notice is issued. We agree with the regulator's view that in certain situations it would clearly be unfair to the person to publish information about the warning notice. However, the Panel would prefer to see that in each case the merits of publishing were considered, weighing the benefits of publication against the impact on the firm and / or individual/s. The size of the firm will be a relevant factor in this equation. If used in this way, in practice we expect that the power would be necessary in the minority of cases, not the majority.

Although we agree with the statement that every publication could have an effect on reputation, we believe that for small firms there are circumstances where publication may create such significant reputational damage that this should be considered. For example, publication could cause harm to the firm due to the significance of the allegations or the size or circumstances of the firm. Although not a sole deciding factor, we believe the FCA should consider reputational damage where it is significant, given its impact on the business owners and employees. Given the desirability of having a large number of small competing financial services firms, and the FCA's new competition objective, it would be desirable if the FCA took a proportionate approach, giving necessary consideration to small firms and the impact this power could have.

We understand the concern about the decision to publish a warning notice statement opening up the merits of the case. In most cases, we would agree with those concerns. However, there are instances where the subject of the notice believes they have strong, simple and clear evidence that disputes the allegation. The RDC chairman should have the ability to consider this and the likelihood to lead to the allegations in the warning notice being significantly reduced at the Final Notice stage or the case dismissed altogether.

ii. *The text of the statements*

In general, we agree with the proposed pieces of information that should be included within a warning notice statement. It is important that such text is carefully considered at the proposal stage, and that the RDC chairman has the opportunity to review and comment on the text.

The current proposed wording of such statements currently risks being misunderstood by consumers, as it implies that the individual or firm has already been found guilty of breaching the rules. The notices could be considered to be overly legalistic, and not achieve the intended outcome of informing consumers about certain enforcement action. We believe the FCA should reconsider the wording and ensure it communicates that:

- The FCA has conducted an initial investigation of a breach;
- The FCA alleges that a person has breached rules or principles, but this has not been proven; and
- The FCA will seek to prove its case before an independent RDC, who will make a decision based on the facts of the case and the arguments put to it by the FCA and the firm/person concerned.

To simplify the warning notice statement, a link could be provided to a webpage with details of the RDC and the FCA enforcement process.

We believe it would be beneficial to also consider the wording of discontinuation notices and statements, and the Panel would be happy to provide further comments on this if requested.

iii. Role of the RDC

The Panel is a strong supporter of the use and role of the RDC and RDC chairman in making regulatory decisions, especially those connected with enforcement action. Given the RDC chairman's independent nature, we welcome guidance being provided to assist him with his role but stress that the FCA must allow sufficient room for his good quality judgement on the need to publish or refrain from publication.