

Chapter 7

Financial penalties and other disciplinary sanctions

7.6 Private warnings

- 7.6.1** In certain cases, despite concerns about a *person's* behaviour or evidence of a *rule* breach, the *FCA* may decide that it is not appropriate, having regard to all the circumstances of the case, to bring formal action for a financial penalty or *public censure*. This is consistent with the *FCA's* risk-based approach to enforcement. In such cases, the *FCA* may give a private warning to make the *person* aware that they came close to being subject to formal action.
- 7.6.2** Private warnings are a non-statutory tool. Fundamentally they are no different to any other *FCA* communication which criticises or expresses concern about a *person's* conduct. But private warnings are a more serious form of reprimand than would usually be made in the course of ongoing supervisory correspondence. A private warning requires that the *FCA* identifies and explains its concerns about a *person's* conduct and/or procedures, and tells the subject of the warning that the *FCA* has seriously considered formal steps to impose a penalty or censure. They are primarily used by the *FCA* as an enforcement tool, but they may also be used by other parts of the *FCA*.
- 7.6.3** Typically, the *FCA* might give a private warning rather than take formal action where the matter giving cause for concern is minor in nature or degree, or where the *person* has taken full and immediate remedial action. But there can be no exhaustive list of the conduct or the circumstances which are likely to lead to a private warning rather than more serious action. The *FCA* will take into account all the circumstances of the case before deciding whether a private warning is appropriate. Many of the criteria identified in ■ DEPP 6 for determining whether the *FCA* should take formal action for a financial penalty or *public censure* will also be relevant to a decision about whether to give a private warning.
- 7.6.4** Generally, the *FCA* would expect to use private warnings in the context of *firms*, *approved persons* and *conduct rules staff*. However, the *FCA* may also issue private warnings in circumstances where the persons involved may not necessarily be authorised or approved. For example, private warnings may be issued in potential cases of *market abuse*; cases where the *FCA* has considered making a *prohibition order* or a disapplication order; or cases involving breaches of provisions imposed by or under Part VI of the *Act* (Official Listing).
- 7.6.5** In each case, the *FCA* will consider the likely impact of a private warning on the recipient and whether any risk that *person* poses to the *statutory*

objectives requires the *FCA* to take more serious action. Equally, where the *FCA* gives a private warning to an *approved person* or *conduct rules staff*, the *FCA* will consider whether it would be desirable and appropriate to inform the *person's firm* (or *employer*, if different) of the conduct giving rise to the warning and the *FCA's* response.

7.6.6

A private warning is not intended to be a determination by the *FCA* as to whether the *recipient* has breached the *FCA's rules*. However, private warnings, together with any comments received in response, will form part of the *person's* compliance history. In this sense they are no different to other *FCA* correspondence, but the weight the *FCA* attaches to a private warning is likely to be greater. They may therefore influence the *FCA's* decision whether to commence action for a penalty or censure in relation to future breaches. Where action is commenced in those circumstances, earlier private warnings will not be relied upon in determining whether a breach has taken place. However, if a *person* has previously been told about the *FCA's* concerns in relation to an issue, either by means of a private warning or in supervisory correspondence, then this can be an aggravating factor for the level of a penalty imposed in respect of a similar issue that is the subject of later *FCA* action.

7.6.7

Where the *FCA* is assessing the relevance of private warnings in determining whether to commence action for a financial penalty or a *public censure*, the age of a private warning will be taken into consideration. However, a long-standing private warning may still be relevant.

7.6.8

Private warnings may be considered cumulatively, although they relate to separate areas of a *firm's* or other *person's* business, where the concerns which gave rise to those warnings are considered to be indicative of a *person's* compliance culture. Similarly, private warnings issued to different subsidiaries of the same parent *company* may be considered cumulatively where the concerns which gave rise to those warnings relate to a common management team.