

Enforcement Guide

Chapter 6

Publicity

6.2 Publicity during, or upon the conclusion of regulatory action

- 6.2.1** For *supervisory notices* (as defined in section 395(13)) which have taken effect, *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*.
- 6.2.2** The FCA's approach to publishing information about *warning notices* is set out in paragraphs ■ 6.2.3 to ■ 6.2.11 below. This should be contrasted with the FCA's approach to the publication of *decision notices* and *final notices* as set out in paragraphs ■ 6.2.12 to ■ 6.2.15 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**
- 6.2.3** 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, or impose a suspension, restriction, condition or limitation on 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*.
- 6.2.4** The decisions on whether to exercise the power to publish information about a *warning notice*, and if so what information to publish, will (subject to ■ EG 6.2.4AG) be taken by the RDC after it has consulted with the *persons* to whom the *warning notice* has been given or copied. The procedure the FCA will follow when making these decisions is set out in DEPP 3.

6.2.4A Where the *settlement decision makers* decide to issue a *warning notice*, they shall also take the decision on whether to exercise the power to publish information about a *warning notice* and if so what information to publish. The *settlement decision makers* will consult with the *persons* to whom the *warning notice* has been given or copied. The *FCA* expects that the *settlement decision makers* are unlikely to decide it is appropriate to publish information about a *warning notice* where a *focused resolution agreement* has been entered into and where it is likely that a *final notice* will shortly follow, save in exceptional circumstances. The procedure the *FCA* will follow when making these decisions is set out in ■ DEPP 5.

6.2.5 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.

6.2.6 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.

6.2.7

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*.

6.2.8

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* or *conduct rules staff*, his or her employer at the relevant time.

6.2.9

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.

6.2.10

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.

6.2.11

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*.

Decision notices and final notices

6.2.12

The *FCA* will consider the circumstances of each case, but will ordinarily publicise enforcement action where this has led to the issue of a *final notice*. The *FCA* may also publicise enforcement action where this has led to the issue of a *decision notice*. The *FCA* will decide on a case-by-case basis whether to publish information about the matter to which a *decision notice* relates, but expects normally to publish a *decision notice* if the subject of enforcement action decides to refer the matter to the *Tribunal*. The *FCA* may also publish a *decision notice* before a person has decided whether to refer the matter to the *Tribunal* if the *FCA* considers there is a compelling reason to do so. For example, the *FCA* may consider that early publication of the detail of its reasons for taking action is necessary for market confidence reasons or to allow *consumers* to avoid any potential harm arising from a *firm's* actions. If a *person* decides not to refer a matter to the *Tribunal*, the *FCA* will generally only publish a *final notice*.

6.2.13

If the *FCA* intends to publish a *decision notice*, it will give advance notice of its intention to the *person* to whom the *decision notice* is given and to any third party to whom a copy of the notice is given. The *FCA* will consider any representations made, but will normally not decide against publication solely because it is claimed that publication could have a negative impact on a *person's* reputation. The *FCA* will also not decide against publication solely because a *person* asks for confidentiality when they refer a matter to the *Tribunal*.

6.2.14

Publication will generally include placing the *decision notice* or *final notice* on the *FCA* website and this will often be accompanied by a press release. The *FCA* will also consider what information about the matter should be included on the *Financial Services Register*. Additional *guidance* on the *FCA's* approach to the publication of information on the *Financial Services Register* in certain specific types of cases is set out at the end of this chapter.

- 6.2.15** However, as required by the *Act* (see paragraph 6.2.1 above), the *FCA* will not publish information if publication of it would, in its opinion, be unfair to the *person* in respect of whom the action is taken or prejudicial to the interests of *consumers*, or detrimental to the stability of the *UK financial system*. It may make that decision where, for example, publication could damage market confidence or undermine market integrity in a way that could be damaging to the interests of *consumers*.
- 6.2.16** 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.
- 6.2.17** In carrying out its review the *FCA* will consider all relevant factors. In particular, the *FCA* will take into account:
- the seriousness of the *person's* misconduct;
 - the nature of the action taken by the *FCA* and the level of any sanction imposed on the *person*;
 - whether the *FCA* has continuing concerns in respect of the *person* and any risk they might pose to the *FCA*'s objectives;
 - whether the *person* is a *firm* or an individual;
 - whether the publication sets out the *FCA*'s expectations regarding behaviour in a particular area, and if so, whether that message still has educational value;
 - public interest in the case (both at the time and subsequently);
 - whether continued publication is necessary for deterrence, consumer protection or market confidence reasons;
 - how much time has passed since publication; and
 - any representations made by the person on the continuing impact on them of the publication.
- 6.2.18** 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.
- 6.2.19** 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 *notice of discontinuance* with the consent of the *person* to whom the *notice of discontinuance* has been copied.
- 6.2.19A** In other cases where a case is resolved following the publication of a warning notice statement, the *FCA* will consider on a case-by-case basis whether to update its website to explain what the outcome was of the case

described in the warning notice statement. Where the warning notice statement was issued on an anonymised basis, the *FCA* will at the same time consider the extent to which it is appropriate to identify the subject of the statement.

Supervisory notices varying a firm’s Part 4A permission, imposing a requirement or varying an approval on the FCA’s own initiative (see EG 8 and DEPP 8) and supervisory notices imposing a direction under regulation 74C of the Money Laundering Regulations on the FCA’s own initiative (see EG 19.15)

6.2.20

[deleted]

6.2.21

It is important that the *FCA* maintains an accurate public record. One of the ways the *FCA* does this is by publishing the reasons for variations of *Part 4A permission*, the imposition of requirements, variations of the approval of *SMF managers* and the imposition and variation of directions under regulation 74C(5) of the *Money Laundering Regulations*. The *FCA* will always aim to balance 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 fundamental and non-fundamental variations of *Part 4A permission* and requirements which it imposes on *firms*, variations of approval of *SMF managers* and directions under regulation 74C(5) of the *Money Laundering Regulations*. But it will use its discretion not to do so if it considers this to be unfair to the *person* on whom the variation or direction 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.

6.2.22

The *FCA* will amend the *Financial Services Register* to reflect a *firm*'s actual *Part 4A permission*, the terms of an *SMF manager*'s actual approval under section 59 of the *Act* following any variation or the terms of a direction imposed under regulation 74C of the *Money Laundering Regulations*.

6.2.23

Where the *FCA* publishes a *supervisory notice* issued under regulation 74C of the *Money Laundering Regulations* and the *FCA* subsequently decides to rescind the direction to which a notice relates or the subject of a direction is successful in overturning the direction, the *FCA* will make it clear on its website that the *supervisory notice* no longer applies. The *FCA* will normally do this by publishing a *notice of discontinuance* with the consent of the *person* to whom the *notice of discontinuance* has been copied.

6.2.24

Where the *FCA* publishes a *supervisory notice* issued under regulation 74C of the *Money Laundering Regulations* and the subject of the direction refers the matter to the *Tribunal*, the *FCA* will make it clear on its website that the supervisory notice has been referred to the *Tribunal*.