

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

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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*.

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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.

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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 copied.*

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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.