

## E-ALERT | Financial Institutions

October 22, 2013

### FCA PUBLISHES EAGERLY AWAITED POLICY STATEMENT ON ENFORCEMENT WARNING NOTICES

Following the FSA's Consultation Paper in March (CP13/8), the FCA has published a new Policy Statement (PS13/9) on its rules surrounding the publication of enforcement warning notices. These new rules will be included in Chapter 6 of the FCA's Enforcement Guide.

The finalised rules reiterate the FCA's belief in the benefits of early transparency in enforcement proceedings and publication of warning notices, but bow to industry pressure and concerns of regulatory lawyers in recognising that it might not be acceptable to publish the names of individuals involved in enforcement proceedings. Previously, the FCA was only able to publish information on such matters at a later stage in the process, once it had decided to take action.

The FCA believes, in publishing such notices sooner, consumers and market users will more readily be able to understand the types of behaviour it considers unacceptable at an early stage, which should encourage compliance and strengthen the FCA's enforcement strategy of 'credible deterrence.' By showing at an earlier stage that the FCA is taking action, it expects enhanced confidence in the regulatory system. The FCA also stated that increased openness in relation to enforcement proceedings is generally in the public interest.

The detail in the Policy Statement focuses on how the FCA will decide whether it is appropriate to publish information about a warning notice. Decision on whether to publish a notice will be a matter of the FCA balancing potential harm to the subject with the benefits of early transparency. Following concerns laid out during the consultation process, it will consider separately whether it is appropriate to identify the subject of the notice, before deciding whether to publish it at all.

The finalised rules state that the FCA will use the following decision process in relation to warning notices:

- It will look at whether it is appropriate to publish details of the warning notice to enable consumers, firms and market users to understand the nature of its concerns. It will consider the circumstances of each case, but expects normally to consider it appropriate to publish the details;
- If it considers it to be appropriate to publish the details, the FCA will consider whether it is also appropriate to identify the subject of the warning notice. It will consider the circumstances of each case, although it believes it will normally be appropriate to identify a *firm* that is the subject of a warning notice, but not necessarily an *individual*;
- Where the FCA considers it appropriate to publish either details of the warning notice identifying the subject, or to publish details of it anonymously, it will consult the persons to whom the notice is given or copied;
- In certain circumstances, (grounds contained within section 391(6) of the Financial Services and Markets Act 2000) it will not be appropriate to publish a warning notice, either anonymously or otherwise. These grounds include where it 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;

- If, after reviewing the grounds in section 391(6) and any representations received, the FCA believes that a publication is still warranted, it will publish the information in a warning notice statement.

To demonstrate potential unfairness, a subject will have to provide clear and convincing evidence of how unfairness might arise and a potential *disproportionate* level of damage.

Following feedback during the consultation period, a subtle lowering of the threshold for unfairness means it may be enough to show that 'significant' loss could be caused by publication. Factors the FCA will consider in reaching a decision include whether the subject of the action is a firm or an individual and the extent to which the subject has been made aware of the case against them in the investigation.

The Policy Statement (PS13/9) can be found [here](#).

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If you have any questions concerning the material discussed in this client alert, please contact the following members of our financial institutions practice group:

**Charlotte Hill**

+44.(0)20.7067.2190

[chill@cov.com](mailto:chill@cov.com)

**William Maycock**

+44.(0)20.7067.2191

[wmaycock@cov.com](mailto:wmaycock@cov.com)

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