



The Association of Independent Financial Advisers

Response to CP08/10 Decision Procedure and Penalties manual and Enforcement Guide Review

AIFA is the trade association that represents UK regulated independent financial advisers (IFAs). Membership of AIFA is voluntary and on a corporate basis. AIFA currently represents over 80% of IFA firms in the UK.

IFA firms are the leading distribution channel for retail financial products in the UK. Last year they generated 73% of business by monetary value and are the major sector advising and arranging retail life and investment products in the UK. As such, IFAs represent a dominant force in the maintenance of a competitive and dynamic retail financial services market.

Q1: Do you agree with our proposal to include a new chapter in EG setting out our non-FSMA powers and how we propose to use them?

We agree that statements of enforcement policy should be signposted and then set out as clearly as possible. Adding a new chapter to EG is a logical way of doing this and more appropriate than placing non-handbook guidance on various pages of the website.

We welcome FSA's desire to provide certainty and agree that adopting processes that have already been publicly consulted on and are in use is probably the fairest course of action.

The FSA must ensure that its non-FSMA powers are not invoked in an arbitrary or uneven way.

Q2: Do you have any comments about our proposals for enforcing the Money Laundering Regulations and the Transfer of Funds Regulations?

We agree that FSA's approach to enforcing these new Regulations should be risk-based and that where both the Regulations and FSA rules apply, FSMA

powers should be used when regulatory action (as opposed to criminal proceedings) is appropriate.

We note that the reason for not applying the settlement discount scheme to penalties imposed under the new Regulations is that other authorities who can impose penalties under the same Regulations do not operate a similar scheme. This scheme, however, does allow FSA to keep Enforcement costs down so we would wish to see FSA keep its options open so that discretion can be exercised if needed in future.

Q3: Do you have any comments about our proposals in relation to the RCB Regulations?

No.

Q4: Do you have any comments about our proposals relating to the use of our existing non-FSMA enforcement powers?

As FSA has enforcement powers under 17 other pieces of legislation, we support the taking of an approach that is broadly similar to the approach taken under FSMA where appropriate.

Q5: Do you have any comments relating to our proposal to include a new leniency factor in EG 12.8?

We acknowledge the difficulty of pursuing insider dealing and other market misconduct offences successfully. If 'leniency' is to be added to the non-exhaustive list of regulatory tools, it must be applied with proportionality.

Q6: Do you have any comments relating to our proposals concerning OIVoPs?

We are concerned that by imposing an OIVoP regardless of a firm's preparedness to co-operate with FSA, reputational and commercial damage may result which may be disproportionate to the non-compliance committed. The result of uneven application or over zealous supervision (albeit unintentional) could be to polarise otherwise good regulatory citizens so we would urge caution and ask FSA to see if the desired outcomes, which are laudable, could be achieved by using powers already to hand more fully before seeking new ones?

We do not share the view that imposing an OIVoPs even when a firm is prepared to take action will give FSA more flexibility or even that flexibility is a high-priority issue here. FSA can already impose conditions on a firm with immediate and effective impact when the potential for consumer detriment is seen and, in our view, the proposal risks undermining the desired cooperative nature of FSA's relationship with the industry.

The more frequent publication of supervisory notices highlighting issues which are currently dealt with 'in-house' may engender the unwelcome perception of wide-scale problems or issues in the sector rather than at individual firms. This would inevitably damage consumer confidence in the industry at a time when the wider public policy concern is for people to take more responsibility for their own financial well-being. This will not happen if trust in the sector cannot be warranted so we would caution FSA against engendering a situation where the entire sector is put at risk of being judged by the standards of the lowest common denominator.

We do not agree that the case has been made for saying that publicising non-fundamental OIVoPs will increase FSA's accountability, thereby increasing public confidence in its work. FSA is accountable to Parliament via HM Treasury and we are not persuaded that publicising non-compliance, where such publicity may be perceived merely as a show of strength, would serve to augment accountability. FSA is already highly accountable and public confidence will not be improved if the relationship between industry and the regulator is adversely affected.

Neither should FSA diminish or under value the significance of having the RDC make the decision to issue supervisory notices. This process serves to maximise transparency and even-handedness, buttresses FSA's authority and in so doing, underscores the important maxim of justice not just being done, but 'being seen to be done'. The proposals for FSA staff to issue non-fundamental OIVoPs puts FSA at risk of accusations of arbitrariness and regulation could become inelegant and inconsistent, putting the goodwill of the reasonably conscientious firm at risk. Firms are obliged (rightly) to be open and transparent in their dealings with the regulator and we would not wish for such obligations to drift towards one-sidedness or inconsistency.

For these reasons, we do not agree that the case for publishing non-fundamental OIVoP supervisory notices has been made at this stage.

Q7: Do you have any comments about our proposals to amend EG 8?

As this move serves to make clearer current policy and is proposed further to requests for clarification, we have no objections to this amendment.

Q8: Do you have any comments about our proposal to include in EG a statement of policy relating to the commencement by the FSA of civil and criminal proceedings?

We do not object to a statement of policy about initiating civil and criminal court proceedings being set out but are concerned that the proposed changes to previous policy may not be as slight as stated. In the interests of transparency and fairness, we would rather that where the RDC Deputy Chairman does decide to commence criminal and / or civil proceedings, he continues to involve another member of the RDC. In our view, we do not believe the case is made for stopping the RDC Chairman taking decisions on discontinuing criminal and civil proceedings as currently. Whilst recognising FSA's well-publicised concerns that enforcement outcomes be more creative and for credible deterrents, we would caution FSA against taking actions that could by-pass safeguards that currently ensure transparency and meets the requirement for justice to be 'seen to be done'.

Q9: Do you have any comments in respect of the proposed amendments to our existing policy outlined in paragraphs 2.46 to 2.54?

No.