3.9 Power to require information relating to potentially unfair etc terms and notices

3.9.1

Schedule 5 to the CRA gives:

(1) (a) the FCA; and

(b) any other person, who may be an FCA employee, specifically authorised or appointed by the FCA for this purpose;

the power to require, by notice in writing, which must contain the particulars specified by paragraph 15 of Schedule 5, the production of information to enable the FCA to ascertain whether a person has complied with or is complying with an injunction granted or an undertaking given under Schedule 3 to the CRA, as described in paragraphs 10.6.2 to 10.6.12 below; and

(2) such an appointed or authorised person the same power to enable the FCA to:

(a) seek an injunction or undertaking under Schedule 3; or

(b) consider whether to do so;

but only if that person reasonably suspects that an unfair term or notice within the scope of Schedule 3 is being used or proposed or recommended to be used.

3.10 Liaison where other authorities have an interest

3.10.1

The FCA has agreed guidelines that establish a framework for liaison and cooperation in cases where certain other UK authorities have an interest in investigating or prosecuting any aspect of a matter that the FCA is considering for investigation, is investigating or is considering prosecuting. These guidelines are set out in Annex 2 to this guide.

3.11 FCA approach to firms conducting their own investigations in anticipation of enforcement action.

Firm-commissioned reports: the desirability of early discussion and agreement where enforcement is anticipated

3.11.1

The FCA recognises that there are good reasons for firms wishing to carry out their own investigations. This might be for, for example, disciplinary purposes, general good management, or operational and risk control. The firm needs to know the extent of any problem, and it may want advice as to what immediate or short-term measures it needs to take to mitigate or correct any problems identified. The FCA encourages this proactive approach and does not wish to interfere with a firm's legitimate procedures and controls.

3.11.2

A firm's report – produced internally or by an external third party – can clearly assist the firm, but may also be useful to the FCA where there is an issue of regulatory concern. Sharing the outcome of an investigation can potentially save time and resources for both parties, particularly where there is a possibility of the FCA taking enforcement action in relation to a firm's perceived misconduct or failing. This does not mean that firms are under any obligation to share the content of legally privileged reports they are given or advice they receive. It is for the firm to decide whether to provide such material to the FCA. But a firm's willingness to volunteer the results of its own investigation, whether protected by legal privilege or otherwise, is welcomed by the FCA and is something the FCA may take into account when deciding what action to take, if any. (The FCA's approach to deciding whether to take action is described in more detail in DEPP 6.2 and paragraph 2.1.4 of this Guide.)

3.11.3

Work done or commissioned by the firm does not fetter the FCA's ability to use its statutory powers, for example to require a skilled person's report under section 166 of the Act or to carry out a formal enforcement investigation; nor can a report commissioned by the firm be a substitute for formal regulatory action where this is needed or appropriate. But even if formal action is needed, it may be that a report could be used to help the FCA decide on the appropriate action to take and may narrow the issues or obviate the need for certain work.

3.11.4

The FCA invites firms to consider, in particular, whether to discuss the commissioning and scope of a report with FCA staff where:

(1) firms have informed the FCA of an issue of potential regulatory concern, as required by SUP 15; or

(2) the FCA has indicated that an issue or concern has or may result in a referral to Enforcement.

3.11.5

The FCA's approach in commenting on the proposed scope and purpose of the report will vary according to the circumstances in which the report is commissioned; it does not follow that the FCA will want to be involved in discussing the scope of a report in every situation. But if the firm anticipates that it will proactively disclose a report to the FCA in the context of an ongoing or prospective enforcement investigation, then the potential use and benefit to be derived from the report will be greater if the FCA has had the chance to comment on its proposed scope and purpose.

3.11.6

Some themes or issues are common to any discussion about the potential use or value of a report to the FCA. These include:

(1) to what extent the FCA will be able to rely on the report in any subsequent enforcement proceedings;

(2) to what extent the FCA will have access to the underlying evidence or information that was relied upon in producing the report;

(3) where legal privilege or other professional confidentiality is claimed over any material gathered or generated in the investigation process, to what extent such material may nevertheless be disclosed to the FCA, on what basis and for what purposes the FCA may use that material;

(4) what approach will be adopted to establishing the relevant facts and how evidence will be recorded and retained;

(5) whether any conflicts of interest have been identified and whether there are proposals to manage them appropriately;

(6) whether the report will describe the role and responsibilities of identified individuals;

(7) whether the investigation will be limited to ascertaining facts or will also include advice or opinions about breaches of FCA rules or requirements;

(8) how the firm intends to inform the FCA of progress and communicate the results of the investigation; and

(9) timing.

3.11.7

In certain circumstances the FCA may prefer that a firm does not commission its own investigation (whether an internal audit report or a report by external advisers) because action by the firm could itself be damaging to an FCA investigation. This is true in particular of criminal investigations, where alerting the suspects could have adverse consequences. For example, where the FCA suspects that individuals are abusing positions of trust within financial institutions and that an insider dealing ring is operating, it might notify the relevant firm but would not want the firm to embark on its own investigation: to do so would alert those under investigation and prejudice on-going monitoring of the suspects and other action. Firms are therefore encouraged to be alive to the possibility that their own investigations could prejudice or hinder a subsequent FCA investigation, and, if in doubt, to discuss this with the FCA. The FCA recognises that firms may be under time and other pressures to establish the relevant facts and implications of possible misconduct, and will have regard to this in discussions with the firm.

3.11.8

Nothing in paragraphs 3.11.1 to 3.11.7 extends or increases the scope of the existing duty to report facts or issues to the FCA in accordance with SUP 15 or Principle 11.

Firm-commissioned reports: material gathered

3.11.9

Where a firm does conduct or commission an investigation, it is very helpful if the firm maintains a proper record of the enquiries made and interviews conducted. This will inform the FCA's judgment about whether any further work is needed and, if so, where the FCA's efforts should be focused.

3.11.10

How the results of an investigation are presented to the FCA may differ from case to case; the FCA acknowledges that different circumstances may call for different approaches. In this sense, one size does not fit all. The FCA will take a pragmatic and flexible approach when deciding how to receive the results of an investigation. However, if the FCA is to rely on a report as the basis for taking action, or not taking action, then it is important that the firm should be prepared to give the FCA underlying

material on which the report is based as well as the report itself. This includes, for example, notes of interviews conducted by the lawyers, accountants or other professional experts carrying out the investigation.

3.11.11

The FCA is not able to require the production of "protected items", as defined in the Act, but it is not uncommon for there to be disagreement with firms about the scope of this protection. Arguments about whether certain documents attract privilege tend to be time- consuming and delay the progress of an investigation. If a firm decides to give a report to the FCA, then the FCA considers that the greatest mutual benefit is most likely to flow from disclosure of the report itself and any supporting papers. A reluctance to disclose these source materials will, in the FCA's opinion, devalue the usefulness of the report and may require the FCA to undertake additional enquiries.

Firm-commissioned reports: FCA use of reports and the protection of privileged and confidential material

3.11.12

For reasons that the FCA can understand, firms may seek to restrict the use to which a report can be put, or assert that any legal privilege is waived only on a limited basis and that the firm retains its right to assert legal privilege as the basis for non-disclosure in civil proceedings against a private litigant.

3.11.13

The FCA understands that the concept of a limited waiver of legal privilege is not one which is recognised in all jurisdictions; the FCA considers that English law does permit such "limited waiver" and that legal privilege could still be asserted against third parties notwithstanding disclosure of a report to the FCA. However, the FCA cannot accept any condition or stipulation which would purport to restrict its ability to use the information in the exercise of the FCA's statutory functions. In this sense, the FCA cannot 'close its eyes' to information received or accept that information should, say, be used only for the purposes of supervision but not for enforcement.

3.11.14

This does not mean that information provided to the FCA is unprotected. The FCA is subject to strict statutory restrictions on the disclosure of confidential information (as defined in section 348 of the Act), breach of

which is a criminal offence (under section 352 of the Act). Reports and underlying materials provided voluntarily to the FCA by a firm, whether covered by legal privilege or not, are confidential for these purposes and benefit from the statutory protections.

3.11.15

Even in circumstances where disclosure of information would be permitted under the "gateways" set out in the Financial Services and Markets Act 2000 (Disclosure of Confidential Information) Regulations, the FCA will consider carefully whether it would be appropriate to disclose a report provided voluntarily by a firm. The FCA appreciates that firms feel strongly about the importance of maintaining confidentiality, and that firms are more likely to volunteer information to the regulator when they know that the regulator is mindful of this sensitivity and the impact of potential disclosure. Accordingly, if the FCA contemplates disclosing a report voluntarily provided by a firm, the firm will normally be notified and given the opportunity to make representations about the proposed disclosure. The exceptions to this include circumstances where disclosure is urgently needed, where notification might prejudice an investigation or defeat the purpose for which the information had been requested, or where notification would be inconsistent with the FCA's international obligations.

4. Conduct of investigations

4.1 Notifying the person under investigation where notice is a requirement under section 170

4.1.1

The FCA will always give written notice of the appointment of investigators to the person under investigation if it is required to give such notice under section 170 of the Act. In such cases, if there is a subsequent change in the scope or conduct of the investigation and, in the FCA's opinion, the person under investigation is likely to be significantly prejudiced if not made aware of this, that person will be given written notice of the change. It is impossible to give a definitive list of the circumstances in which a person is likely to be significantly prejudiced by not being made aware of a change in the scope or conduct of an investigation. However, this may include situations where there may be unnecessary costs from dealing with an aspect of an investigation which the FCA no longer intends to pursue.

The FCA recognises the importance of consistency in its decision-making and that it must consider the approach previously taken to, say, the application of a particular rule or Principle in a given context. This applies equally to consideration by the RDC or by the settlement decision makers when they look at action taken by the FCA in earlier, similar, cases. This is not to say that the FCA cannot take a different view to that taken in the earlier case: the facts of two enforcement cases are very seldom identical, and it is also important that the FCA is able to respond to the demands of a changing and principles–based regulatory environment. But any decision to depart from the earlier approach will be made only after careful consideration of the reasons for doing so.

6. Publicity

6.1 Publicity during FCA investigations

6.1.1

The FCA will not normally make public the fact that it is or is not investigating a particular matter, or any of the findings or conclusions of an investigation except as described in other sections of this chapter. The following paragraphs deal with the exceptional circumstances in which the FCA may make a public announcement that it is or is not investigating a particular matter.

6.1.2

Where the matter in question has occurred in the context of a takeover bid, and the following circumstances apply, the FCA may make a public announcement that it is not investigating, and does not propose to investigate, the matter. Those circumstances are where the FCA:

(1) has not appointed, and does not propose to appoint, investigators; and

(2) considers (following discussion with the Takeover Panel) that such an announcement is appropriate in the interests of preventing or eliminating public uncertainty, speculation or rumour.

6.1.3

Where it is investigating any matter, the FCA will, in exceptional circumstances, make a public announcement that it is doing so if it considers such an announcement is desirable to:

(1) maintain public confidence in the financial system or the market; or

(2) protect consumers or investors; or

(3) prevent widespread malpractice; or

(4) help the investigation itself, for example by bringing forward witnesses; or

(5) maintain the smooth operation of the market.

In deciding whether to make an announcement, the FCA will consider the potential prejudice that it believes may be caused to any persons who are, or who are likely to be, a subject of the investigation.

6.1.4

The exceptional circumstances referred to above may arise where the matters under investigation have become the subject of public concern, speculation or rumour. In this case it may be desirable for the FCA to make public the fact of its investigation in order to allay concern, or contain the speculation or rumour. Where the matter in question relates to a takeover bid, the FCA will discuss any announcement beforehand with the Takeover Panel. Any announcement will be subject to the restriction on disclosure of confidential information in section 348 of the Act.

6.1.5 [deleted]

6.1.6

The FCA will not normally publish details of the information found or conclusions reached during its investigations. In many cases, statutory restrictions on the disclosure of information obtained by the FCA in the course of exercising its functions are likely to prevent publication (see section 348 of the Act). In exceptional circumstances, and where it is not prevented from doing so, the FCA may publish details. Circumstances in which it may do so include those where the fact that the FCA is investigating has been made public, by the FCA or otherwise, and the FCA subsequently concludes that the concerns that prompted the investigation were unwarranted. This is particularly so if the firm under investigation wishes the FCA to clarify the matter.

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[8], 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 be

[8] Section 55Y(2) and section 391(8) of the Act define when a variation of permission under a supervisory notice takes effect

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.

6.2.5

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 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 abrief 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.