

The Financial Services Act 2012 gave the Financial Conduct Authority (**FCA**) a new power to publish information about certain Warning Notices in proposed disciplinary actions against regulated firms and individuals, a "Warning Notice Statement" (**WNS**).

On 15 October 2013, the FCA confirmed, after a period of consultation, that it will, going forward, be using this new power in enforcement cases.

To re-cap, the FCA is required to give a Warning Notice to the subject of a proposed enforcement action in a wide variety of circumstances, for example, when proposing to publish a statement or censure, to impose a penalty or to require restitution. A Warning Notice must, amongst other things, state the action which the FCA proposes to take and give reasons for the proposed action.

Up until 15 October 2013, the FCA could only publish details of disciplinary action at a much later stage of the proceedings, when the Regulatory Decisions Committee (**RDC**) had issued a Decision Notice, that is to say, after a firm or individual had made representations to the RDC in response to a Warning Notice, but before the Upper Tribunal had made a decision.

So until that stage, the fact of disciplinary action in most cases remained confidential to the firm or individual and to the FCA.

In March 2013, the FCA began consultation on the proposed policy for using the new power to publish a WNS. On 15 October 2013, the FCA published a Policy Statement confirming that it will indeed be using its new power.

The FCA has said that the WNS will "usually" name the firm under investigation and, in certain circumstances, name an individual. A WNS will ordinarily include a brief summary of the facts which give rise to the Warning Notice which the FCA says is to enable consumers, firm and market users to understand the nature of the FCA's concerns.

The FCA says that it will consider the circumstances of each case in deciding whether it is appropriate to publish the WNS and, if so, what details to publish. It will also consult the person under investigation and take into account any evidence that publication would be unfair before making a final decision on the WNS.

The FCA says that publishing these details will support the FCA's objectives of consumer protection and protecting and enhancing the integrity of the UK's financial system. It will also make clear to consumers, firms and investors, the sort of behaviour that is considered unacceptable by the FCA and will make the enforcement process more transparent.

The FCA's Director of Enforcement, Tracey McDermott, said:

"We listened carefully to views from inside and outside the industry. I believe we have got the balance right so we now have in place a regime that enables us to provide information to customers, investors and firms earlier about the action we are taking to tackle misconduct to ensure markets work well and consumers get a fair deal. It is clear that the more transparent and open that we can make the regulatory process, the more confidence we can give people that we are acting in their best interest".

Although the FCA has put in place some safeguards on the process after consulting with the industry, there is little doubt that the WNS regime will be highly controversial.

Critics have noted that the new power will bring forward in time the likelihood of publicity for a firm or individual involved in enforcement action. And that this may be publicity in circumstances where the RDC may yet hear representations from a firm in response to a Warning Notice and in fact could find that there is no case for the firm to answer.

The concern here is that the publicity generated by the WNS comes uncomfortably close to representing a *de facto* public censure by the FCA without due and proper process. And it may cause significant reputational damage or affect share prices *even if* the firm in question was not ultimately the subject of an adverse disciplinary finding by the FCA.

Whilst the FCA has said that it will make clear in a WNS that it is not the FCA's final decision, many will conclude that there can be "no smoke without fire". And whilst the FCA has said that if it publishes a WNS and subsequently decides not to take any further action against the firm or individual, it will then publish a notice of discontinuance, that could, in reality, be many months down the road by which the stage the damage may already have been done.

We await the first WNS and industry reaction to that. But an increase in firms taking legal action to restrain the FCA from publishing a WNS cannot be ruled out. Nor can legal proceedings by firms in circumstances in which the FCA has published a WNS but then subsequently issues a notice of discontinuance.

Contacts



Garon Anthony

Senior Associate

T +44 121 222 3507

E garon.anthony@squiresanders.com

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