

3 September 2008

Kate Higginson
Enforcement Division
Financial Services Authority
25 The North Colonnade
Canary Wharf
London, E14 5HS

By e-mail to: cp08-10@fsa.gov.uk

Dear Kate

**CP08/10: Decision Procedure and Penalties manual and Enforcement
Guide Review 2008**

The IMA represents the asset management industry operating in the UK. Our Members include independent fund managers, the investment arms of retail banks, life insurers and investment banks, and the managers of occupational pension schemes. They are responsible for the management of £3.4 trillion of assets, which are invested on behalf of clients globally. These include authorised investment funds, institutional funds (e.g. pensions and life funds), private client accounts and a wide range of pooled investment vehicles. In particular, our Members represent 99% of funds under management in UK-authorized investment funds (i.e. unit trusts and open-ended investment companies).

We welcome the opportunity to comment on the proposals made in the paper.

We have contributed to the response submitted to you by the Financial Services and Markets Legislation City Liaison Group and fully support the points made therein.

We would particularly like to emphasise the following points raised by the City Liaison Group:

- The proposals around the use of publicity in relation to non-fundamental OIVoPs seem to lack rigour. We are concerned that they amount to public censure without due process, the lack of control around the proposed use of this tool and about the possible unintended consequences for the relationship between firms and the FSA.

Please find specific comments, over and above those made in the joint response, in the attached Paper.

I look forward to hearing from you if there is any clarification that you would find useful on the points we have raised.

Yours sincerely

Adrian Hood
Regulatory Adviser

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We provide below answers only to those questions from the consultation that fall within IMA's remit and where we have further points to raise beyond those in the joint Financial Services and Markets Legislation City Liaison Group response

Q.6 – Do you have any comments relating to our proposals concerning OIVoPs?

We would refer the FSA to our response to DP08/3 regarding the proposals concerning OIVoPs as well as to the Financial Services and Markets Legislation City Liaison Group response to this consultation, to which we contributed.

We specifically wish to highlight our concern about the examples of where you may decide to impose an OIVoP, as listed in paragraph 2.32, which correspond to the proposed EG 8.3. While we have little concern with the first three bullet points we consider that this last point (corresponding to EG 8.2(4)) is unsupported by any of the FSA's powers, specifically s45 of FSMA, which sets out the purposes for which the regulator may use its OIVoP powers. These all relate to the firm and its customers. No mention is made of using the firm as an example for other firms. If the FSA wishes to send such messages it has numerous other tools through which this could be done.

Such a holding up of a firm's wrong-doings for general view amounts to public censure, and were the FSA not to follow due process, up to and including such decisions being made by the RDC with a right of appeal to FSMT, then this would clearly be in breach of statutory restrictions.

With regard to the examples of non-fundamental OIVoPs given in 2.34, they all seem to be, by their nature, private actions. In ensuring that a firm meets its threshold conditions and in protecting customers there is no need to give publicity to the OIVoP. To do so would risk public censure of the firm without due process being followed by the FSA.

The FSA gives an example, in paragraph 2.37, of where it may publicise non-fundamental OIVoPs, being where a firm does not appear to comply with regulatory requirements. The FSA seems to propose public censure of such a firm, by publicising their imposition of an OIVoP, without ever trying to prove that the firm did, in fact, breach the requirements.

This proposal by the FSA, to change their approach to publishing notices relating to non-fundamental OIVoPs to match that for fundamental OIVoPs (2.35) without any change to the controls over their use of this power, is unwarranted. At the very least, decisions should be taken by the RDC rather than by FSA staff under executive procedures, and there should be a right of appeal to the FSMT.

As regards the effect of such a departure from its current practice, while the FSA might be correct that the public will have increased confidence in the efficacy of the FSA's work, it is at least as likely that the media will twist the results to highlight negative aspects of firms, e.g. issuing poor quality financial promotions for years and not being fined or prosecuted, so worsening public confidence in both firms and the FSA. The proposed change will certainly reduce the confidence of the industry in the FSA, as, rather than having to prove its case under a due process regime before censuring a firm, the FSA seems to be proposing that it can publicise alleged unproven, failings of firms, without sufficient due process protection and no effective right of appeal.