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To: Matthew Horne
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17 December 2010

Dear Sirs,

FSA Consultation Paper (CP10/23) – Decision Procedure and Penalties manual and Enforcement Guide review 2010

The City of London Law Society ("**CLLS**") represents approximately 13,000 City lawyers through individual and corporate membership including some of the largest international law firms in the world. These law firms advise a variety of clients from multinational companies and financial institutions to Government departments, often in relation to complex, multi jurisdictional legal issues.

The CLLS responds to a variety of consultations on issues of importance to its members through its 17 specialist committees. This response has been prepared by the CLLS Regulatory Committee (the "**Committee**"). Members of the Committee advise a wide range of firms in the financial markets including banks, brokers, investment advisers, investment managers, custodians, private equity and other specialist fund managers as well as market infrastructure providers such as the operators of trading, clearing and settlement systems.

The Committee welcomes the opportunity to respond to Consultation Paper 10/23 (the "**CP**") and is grateful to the FSA for agreeing to receive our submission after 14 December 2010. We wish to make the following comments on the FSA's proposed approach to publishing decision notices.

Publication of decision notices in different contexts

As a general point, the CP seems to us to suggest that the FSA deems it appropriate to consider decision notices and final notices together as if they are different versions of the same thing. We do not consider that approach as appropriate, or consistent with the FSA's duties as a public authority; decision notices and final notices should be considered in the

context of their own characteristics, and the relevant policy propositions should properly consider their differing natures. Similarly the CP does not consider whether, in the context of the extension to section 391, when the FSA will publish brief details about a case instead of a decision notice (as has happened historically in relation to authorisation/approval final notices) as being the appropriate "information about the matter" to fulfil its duties.

When considering what is "appropriate" in our view in each case the FSA must have regard to usual public law considerations of natural justice and reasonableness. In particular the policy to publish decision notices where a matter is referred to the Upper Tribunal does not take account of the distinction between notices (i) in a disciplinary context; and (ii) relating to authorisations or approvals and it would seem that no consideration has been given to what information it might be appropriate to publish in those different contexts. For example, we would expect more information to be published in the disciplinary context than in the context of an application or approval when, in the latter case, it may not be appropriate to publish any information at all (on the basis that the person concerned may not yet be conducting any business).

Limits on publication

The FSA's duty to publicise such information from a decision notice or final notice as it considers appropriate is subject to a prohibition on publication if either it would be unfair to the person against whom action has been taken or where it would be prejudicial to the interests of consumers. This point is not fully addressed in the proposed changes to the Enforcement Guide. In addition to protecting consumers it is necessary to consider fairness to the individual and/or firm concerned. Even in the case of a disciplinary decision notice publication of a decision notice could be highly prejudicial without serving any consumer protection purpose, unless there is some concern that the applicant may be acting unlawfully pending a Tribunal decision.

Notice of discontinuance

We disagree with the FSA's suggestion that it is sufficient to merely publish a notice of discontinuance on its website in relation to successful Tribunal applications in relation to which a decision notice was published. We believe that it would be more appropriate for the decision notice and discontinuation notice to be overtly linked on the FSA website so that it is clear the two notices are related. Indeed where the Tribunal application has been successful there is a clear case for removing the decision notice.

Press releases

It is suggested that press releases will often accompany the publication of a decision notice or a final notice. It is not made clear in the CP, why the FSA believes that additional degree of publicity is appropriate (contrast, for example, in the context of authorisations in which it has historically been rare for such a press release to be made).

Removal of notices and press releases

We would welcome further elaboration, in paragraph 6.10 of the proposed amendments to the Enforcement Guide, as to the circumstances in which the FSA might conclude that it will remove a notice from the FSA's website before a period of six years has lapsed. The word "usually" conveys no idea as to what might be "unusual".

We would be happy to discuss any of our comments with you. Please contact Margaret Chamberlain on +44 (0)20 7295 3233 or by e-mail at: margaret.chamberlain@traverssmith.com.

Yours faithfully

PP. 

Margaret Chamberlain
Chair, CLLS Regulatory Law Committee

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