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17 September 2021

Dear Sir or Madam

FCA Consultation Paper – Issuing statutory notices – a new approach to decision makers (CP 21/25)

The City of London Law Society ("**CLLS**") represents approximately 17,000 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 19 specialist committees.

This letter has been prepared by the CLLS Regulatory Law Committee (the "**Committee**"). The Committee not only responds to consultations but also proactively raises concerns where it becomes aware of issues which it considers to be of importance in a regulatory context.

The Committee has studied the Consultation Paper ("**CP**") and wishes to provide its views on the proposed new approach to decision-making.

1. The proposal

Q1: Do you agree with the proposal to move some statutory notice decisions from the RDC to the Executive? Please give reasons for your answer.

Q2: Do you agree with the categories of decision that we suggest? If not, which statutory notice decisions do you consider the RDC should keep? And which statutory notice decisions should be made under Executive Procedures?

Paragraph 5.11 proposes that the decision to issue a statutory notice on the following issues be made under Executive Procedures rather than by the RDC:

a) Authorisations (refusal of permission);
b) Straightforward cancellations (e.g. threshold conditions); and
c) Interventions (variation of permission and imposition of requirements fundamental/non-fundamental).

Omitted from this list but apparent from para 1.4 and also the draft DEPP2 Annex 1G is:

d) Refusing an application for individual approval.

We do not agree with the above proposal because:

i. the FCA has not made a convincing case for depriving market participants of the benefits of the RDC process in non-urgent cases such as refusal of authorisation, intervention, or approval ((a) (c) and (d) in our list);
ii. the RDC encourages diversity of thought within the FCA; and
iii. based on the above, we consider that the proposal would overall result in a diminution of proper consideration.

We have outlined our considerations further below.

In summary – Based on the CP, our observation is that the main catalyst which is driving the proposals is the desire to improve the speed and efficiency of decision making, and to allow the RDC to focus on significant misconduct cases. We agree there is a category of decisions that may need to be made urgently when the FCA needs to intervene to prevent harm. However, we note that DEPP 3.4.3 already makes provision for exceptionally urgent supervisory notice cases to be heard by an executive and DEPP 3.4.4 already allows that executive to take the decision to give the notice even if he has been involved in establishing the evidence on which the notice is based. The only criterion other than urgency in the interests of consumer protection is that FCA staff consider the action should be taken before a recommendation can be made to the RDC Chairman/Deputy Chairman – we do not consider this to be a particularly high bar.

On balance, we agree with the proposal for commencement of civil proceedings under Executive Procedures.

In relation to commencement of criminal proceedings, however, we consider that maintaining the status quo could ensure that there is a “fresh pair of eyes” overseeing the decision, especially given the consequences of criminal proceedings for the individual concerned.

We also do not consider that this rationale has any application to refusal of authorisation or approval decisions.

The RDC should be retained for all non-urgent decisions – Refusal of authorisation and variations of permission are matters of great significance to the subject firm, which will usually have invested a significant amount of financial and non-financial resources to apply for, or obtain authorisation. Further, the refusal of authorisation in the United Kingdom could potentially cause repercussions or be prejudicial if the firm is authorised or is in the process of becoming authorised in another jurisdiction. We also make the same point(s) in respect of the proposals in CP21/26 to use Executive Procedures in exercising powers to impose, vary or not to rescind a requirement imposed on the non-authorised parent of an FCA investment firm under Part 9C. Refusal of an application for individual approval is equally important for both the individual and the associated firm; indeed, it is one that can be effectively career-terminal for the individual concerned. These decisions do not have the same urgency as, for example, intervening to prevent harm. An unauthorised firm

cannot carry on a regulated activity, nor can an unapproved individual take any decisions for a firm prior to approval. Similarly, a firm which is authorised should only be subject to exceptionally urgent supervisory notices in the existing circumstances. We consider that the RDC should be maintained for these cases as it is an important component of due consideration within the FCA to ensure that such decisions are made after due scrutiny and by people independent of the FCA executive. This is because:

i. **The RDC gives assurance of proper consideration –** Our view is that often it is the RDC process that gives both firms and individuals the assurance that their matters have been given proper and due consideration. We are concerned that, without the RDC's involvement, individuals may not feel that they have been given an opportunity to present their case and have their matters heard, especially if they are not given the opportunity to make oral representations (as we will discuss further in the next section). This is important – part of maintaining confidence in the FCA and its processes is the knowledge that an application will be considered fairly and objectively, and that where it is minded to refuse, the affected person will be able to have their say in the outcome.

ii. **The RDC potentially improves the FCA's decision making –** We consider that the RDC serves a quasi-independent function within the FCA. Though the RDC is bound by policy, it is still able to assess a case from a fresh perspective and has the ability to challenge any potential FCA group think. It also receives independent legal advice, which we view as a key element in assisting it to make an objectively correct decision with the FCA's legislative and policy framework. We also believe that the RDC encourages diversity of thought within the FCA which, as the FCA itself fully recognises through its proposals to improve the industry's diversity, is of paramount importance. This achieved by the RDC receiving its own independent legal advice, asking questions and its ability to challenge all parties including the FCA where necessary.

2. Oral representation

Q4: Do you agree with the proposal that oral representations may only be made to Executive decision makers in exceptional circumstances? If not, please give reasons for your answer.

Paragraph 5.25 outlines that for statutory notice decisions to be made under Executive Procedures, the FCA will take account of written representations, but only in exceptional circumstances will allow recipients to make oral representations.

We do not agree with the proposal that oral representations may only be made to the Executive decision makers in exceptionally limited circumstances. We consider the ability to make oral representations to be an integral part of the decision-making process and the ability to be heard in itself enhances public confidence in the enforcement process. In particular, our primary concern is that authorisation and approval applications do not lend themselves well to a decision-making process that is entirely in writing. Through the oral representation process in the RDC, the committee has the opportunity to meet, gauge and question the individuals behind an application, which is surely a key element of determining fitness and properness in a contested application. Some individuals naturally communicate better orally or on a more interactive basis rather than in writing, so removing their ability to make submissions orally could also result in a diminution of proper consideration. Oral representations could also serve as a mechanism for the FCA to better ensure that it has all relevant facts and matters for its decisions – notably when those seeking to make representations are less experienced or able to address fully what may involve interpretations of complex matters. The interactive nature of oral representations can potentially speed up the process whereby the FCA obtains additional information where it is clearly needed for it to fulfil its public law responsibilities.

We consider that transferring refusal decisions from the RDC, and curtailing oral representations, is a significant diminution of the opportunities that prospective authorised firms and approved

individuals have with regard to their applications. We consider that it would be a significantly retrograde step, wholly inconsistent with the FCA's aim for achieving transparency in its operations, and also contrary to the statement at para 1.9, which is that these changes "*will not compromise the rights and protections that firms and individuals who are subject to these processes have; we will still remain transparent and accountable for all our decisions made through either process*".

3. Other issues

Paragraph 5.19 proposes to amend the definition of Senior Staff Committee meeting so that it would comprise a minimum of two, rather than three people. This could diminish safeguards and undermine the decision-making process as one of the two staff could be involved in establishing the evidence.

Paragraph 5.32 outlines that FCA staff responsible for taking the statutory notice decision may be advised by legal advisers who have also advised FCA staff recommending the action by the FCA. We are concerned that this undermines the sentiment expressed in paragraph 5.11, which recognises that there is a "*need to ensure that decision makers who determine whether to issue a statutory notice are not involved in establishing the evidence which forms the basis for the recommended action against a firm or individual*".

Similarly, we note that under Executive Procedures undisclosed communications between the decision maker and the staff team recommending the decision, to which the party affected by the decision is not privy, are permissible (as outlined in paragraph 5.33), and consider that this further undermines the perceived fairness of decisions made under Executive Procedures and thus highlights the need to maintain the RDC where possible.

The FCA's own website states, in relation to the RDC:

"*The separation of the RDC ensures that decisions are not made by FCA staff who are recommending action against a firm or individual. The RDC also has its own team of support staff and legal advisers ….*

Once a statutory notice has been issued, the RDC will not discuss a case with the FCA staff who are recommending the action while the case is ongoing, unless a representative for the individual/firm is present or given an opportunity to respond …

The firm/individual will usually be given access to all of the materials that the RDC panel consider…

The RDC will always consider any written or oral representations that you may wish to make on the action proposed or (in the case of a first supervisory notice) taken. The representations may not change the decision, but in many cases the RDC panel has altered a decision as a result of representations and, in some cases, has decided to take no further action. All of this helps to ensure that decisions are made fairly."

We agree with the above, and it is our view that the great benefits of the RDC as outlined above should be preserved.

Lastly, we highlight that the FCA is post-EU exit taking on considerably greater rule-making power and there is already a blurring between "government" policy making and supervision of that policy. We consider that the RDC is the only "practical" check and balance for firms, which we all know will avoid going to the Tribunal owing to the consequent considerable delay, cost and publicity. We note, in addition, with some concern the FCA's 29 April 2021 board minutes which state that the FCA intended to "*recalibrate the degree of legal risk the organisation is willing to take*", including "*in situations where the law is unclear or FCA action is intended to prevent imminent consumer harm*". If the law is clear, FCA action should be taken in line with the law. If the FCA intends to take decisions where there is a legal risk that the FCA may not have the power to take such a decision, or take it in

the way or with the impact intended, then such actions should be subject to review by the RDC. In light of this, it is our overall position that the RDC should be retained to the extent possible.

If you would find it helpful to discuss any of these comments then we would be happy to do so. Please contact Karen Anderson by telephone on +44 (0) 20 7466 2404 or by email at Karen.Anderson@hsf.com in the first instance.

Yours faithfully

Karen Anderson
Chair, CLLS Regulatory Law Committee

THE CITY OF LONDON LAW SOCIETY
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Individuals and firms represented on this Committee are as follows:

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