

4 February 2013

James Crump  
Conduct Policy Division  
Financial Services Authority  
25 The North Colonnade  
Canary Wharf  
London E14 5HS

Dear James,

### **CP12/35 The FCA's use of temporary product intervention rules**

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 over £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).

It is as managers of authorised funds, which either are directly held by retail consumers or are the investments underpinning the wrapped investment products offered by other providers, that our members are interested in this Consultation Paper.

We broadly welcome the proposed approach to the use of temporary product intervention rules by the FCA. We recognise the need for the regulator to intervene swiftly in the event of perceived imminent consumer detriment.

However, we would make the following observations:

#### **Identification**

Generally, it is the case that products of any type take a reasonable length of time in development and testing before being brought to market. Therefore it is unlikely that such "toxic" products would appear suddenly.

A combination of regulatory supervision and market intelligence should enable the regulator to identify the possibility of consumer detriment being introduced to the market

early on in the process. We are concerned that, in developing this tool, the FCA should not lose sight of the need for proper and rigorous supervision as the key mechanism for identifying incidents of mis-selling and other egregious practices.

In our response to DP11/1: Product Intervention we remarked that it was often the case that market practitioners were able to identify cases of consumer detriment through their knowledge and experience of the market and products. We recommended that the FSA should consider a mechanism whereby such experience could be used to deliver “early warnings” without going through the formality of a whistleblowing procedure or being suspected of competitive sour grapes. We would reiterate this recommendation for consideration by the FCA.

It will be crucial that in exercising its powers the FCA is precise in its definition of “the product”. The recent consultation on the marketing of UCISs revealed issues with FSA drafting, which continue to be debated.

It will also be crucial that in considering whether to exercise its powers, the FCA distinguishes clearly between product features, poor or bad product disclosures and poor distribution practices.

Prevention is better than cure. We would hope the FCA will encourage firms to have pre-launch discussions with it, especially where products have new or innovative features.

## **Governance**

We would also urge the FCA to engage market participants in the decision-making process before issuing temporary product intervention rules. We note that the process for making such interventions incorporates a process for preparation of a paper at working group level, consideration of this paper by an internally constituted Committee and eventual presentation to the FCA Board, which is scheduled to meet on a monthly basis. It is our view that this timescale could incorporate input from industry participants, particularly if they were alive to the urgency of the consultation process.

We note, also, that it is proposed that the views of the three panels - the Consumer Panel, the Practitioner Panel and the Smaller Business Practitioner Panel - are to be sought “if there is sufficient time to do so”. We would suggest that in the circumstances envisaged above it should be possible to seek input from appropriate representatives from these panels.

## **Transparency of decision-making**

We note the proposal that the FCA would publish a statement on its website explaining why it is introducing the temporary rule. Whilst this is to be welcomed and expected, we would urge the FCA to consider being more transparent about its decision-making process, not just the end result of it. The FCA should consider the publication of more detail of the issues considered, the market sector affected, those consulted and the perceived detriment avoided.

The Consultation Paper considers the potential impact that this proposal might have upon innovation and market entry. The CP acknowledges these concerns but does not

consider that using such rules would raise barriers to entry or be detrimental to product innovation.

We do not wholly agree with this position, although it will remain to be seen whether those concerns crystallise. However, such concerns could be mitigated somewhat if the FCA were explicit about what options the affected market sector might have if the decision to intervene was not appropriate. Given the FCA has a wide immunity from suit, it is doubly important that it is open to review a temporary intervention during the term it is in force.

These same concerns are equally relevant for consumers, as the FSA notes in paragraph 3.10.

### **Single Market considerations**

We support the sentiments that the international dimension and EU legislation will be considered by FCA. Our sector has a particular interest in this area, given the long-standing UCITS authorisation process and passport.

We would be happy to discuss any of the points raised in this response and look forward to an on-going dialogue with you regarding next steps.

Yours sincerely

A handwritten signature in black ink, appearing to read 'Andy Maysey', with a long horizontal flourish extending to the right.

Andy Maysey  
Senior Adviser, Retail Distribution