

SII Compliance Professional Interest Forum comments on FSA CP09/19 — Enforcement financial penalties: Prevention not cure

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The Securities & Investment Institute's Compliance Professional Interest Forum has contributed to the FSA Consultation Paper CP09/19 on Enforcement financial penalties. The SII Compliance Forum states that there are significant downsides in over reliance on increased penalties rather than the likelihood of detection as a means of changing behaviour. "The focus on penalties has excluded what must be the primary aim of the enforcement regime — to change behaviour. This cannot be achieved without equal prominence being given to the detection regime. Thus we believe that the focus of the discussion paper is too far weighted to penalties as a 'cure' for non-compliant behaviour, rather than detection, inter alia, as a 'prevention'".

The SII Forum recognizes that in the heated political climate in which the FSA operates, it has to respond to public perception that individuals and firms are "getting off". However, the forum thinks that such a perception can be challenged. Firms in this situation have to bear significant costs of rectification, not to mention the intangible but likely higher cost of the loss of reputation involved. The SII Forum is also sceptical of any cost/benefit analysis that might be produced. The Forum's view is that "large penalties have been used in the USA for some years, with no discernible effect on behaviour."

The SII Forum supports the concept of making the punishment fit the crime: "We understand the thrust of the FSA's proposals. However, the FSA's response to a firm or an individual's wrongdoing must be proportionate. The way in which the FSA deals with the firm must be transparent and, above all, the FSA should seek to "prevent" rather than "cure" the underlying issue. For these given reasons the SII Compliance Forum is not persuaded that the tenor of the present proposals meet the FSA's stated objectives."

The SII Forum amplifies its argument in its response to the FSA question "Do you have any comments about our proposals in relation to the determination of penalty levels in cases against firms?". The Forum says, "We are concerned that this is a one-size fits all policy that is over reliant on mechanistic process and takes insufficient into account when considering the detail of the individual cases."

When asked about the FSA proposals in relation to the "determination of penalty levels in disciplinary cases against individuals?", the Forum states that it is "keen that FSA distinguish between inadvertent and pre-meditated breaches. The forum's members, being predominantly compliance personnel, are acutely conscious of both their own role in ensuring their firm acts in a compliant manner, whilst also being aware of their sometimes limited capacity to ensure that it does so act. The Forum is thus extremely concerned that FSA directs these powers at ultimate/critical decision makes within firms."

Regarding the FSA's proposal on "determination of penalty levels in cases against individuals for market abuse?" the SII Forum warns that "The minimum fine of £100,000 is excessive. The forum notes that a great many of the individuals who to date have been found guilty of market abuse have been "small people" of limited means. Their offences have often been a result of immaturity, youth and inexperience. Whilst this does not make these offences pardonable, it should be born in mind when setting penalties."

Julian Sampson FSI, chairman of the SII Compliance Forum, said: "Far greater deterrent effect would be achieved — and greater changes to behaviour result — if the FSA changed its focus from enforcement to supervision. The forum believes that the FSA would have far greater impact on behaviour were it to actually visit those firms."