

British Private Equity & Venture Capital Association

5th Floor East, Chancery House
53-64 Chancery Lane
London WC2A 1QS
T +44 (0)20 7492 0400
bvca@bvca.co.uk www.bvca.co.uk



21 October 2014

Bob Ferguson
Policy Risk and Research Division
Financial Conduct Authority
25 The North Colonnade
Canary Wharf
London E14 5HS

By email: bob.ferguson@fca.org.uk

Dear Mr Ferguson,

Re: Retrospective application of regulatory rules: call for examples

This response to the FCA's call for examples in respect of the retrospective application of regulatory rules is made by the Regulatory Committee of the British Private Equity and Venture Capital Association (the "BVCA").

The BVCA is the industry body for the UK private equity and venture capital ("PE/VC") industry. With a membership of over 500 firms, the BVCA represents the vast majority of all UK-based PE/VC firms and their advisers. Its members have invested £33 billion in over 4,500 UK companies over the last five years. Companies backed by UK-based PE/VC firms employ over half a million people and 90 per. cent of UK investments in 2012 were directed at small and medium-sized businesses.

We would be happy to discuss any of the issues raised in this letter in further detail with the FCA if this would be helpful. If this would be helpful, please contact Gurpreet Manku (Director of Technical and Regulatory Affairs, BVCA) (gmanku@bvca.co.uk) in the first instance.

Yours sincerely,

A handwritten signature in black ink, appearing to read 'Sheenagh Egan', is written over a circular stamp. The signature is fluid and cursive.

Sheenagh Egan
Chair - BVCA Regulatory Committee



RETROSPECTIVE APPLICATION OF REGULATORY RULES: CALL FOR EXAMPLES

Q1: What is your main example of retrospective application of rules by the FCA or the FSA?

We understand "*retrospective application of regulatory rules*" to refer to those instances in which the FCA (or the FSA) applies (or has applied), with the benefit of hindsight, a more demanding standard or interpretation of the relevant rules after the event.

This gives rise to the risk that certain conduct or industry practice which is deemed acceptable at a point in time may later be viewed negatively by the regulator and result in action being taken against firms and individuals. This creates a lack of regulatory certainty and therefore a barrier to innovation and is, in our view, wholly inconsistent with the FCA's stated aims of, "... [*allowing*] firms to try new ideas and develop their business" and "... [*being*] careful not to stifle growth" (Journey to the FCA, October 2012).

Our main example of the retrospective application of regulatory rules relates to the FSA's 'Treating Customers Fairly' (TCF) initiative. Whilst the FSA's TCF Principle 6 applied to firms in relation to all clients, when the TCF initiative was launched requiring firms to undertake extensive work benchmarked against detailed FCA announcements, it appeared only to be relevant to those firms which dealt directly with retail clients. However, from a speech given by Sarah Wilson, FSA Director, TCF in April 2008 it became apparent that wholesale firms also needed to consider the TCF requirements where their actions could have a material impact on outcomes for end-retail clients and that such firms must be able to meet the TCF outcomes where the firm played a role in the retail distribution chain. The scope of the FSA's requirements in relation to TCF was, therefore, broadened retrospectively.

In order for firms to meet their regulatory obligations it must be clear from the outset and from the face of the FCA Handbook whether rules apply to them. If this is not the case, firms can be penalised for non-compliance with rules in respect of which it was not apparent that they should comply.

Q2: What in particular justifies the label 'retrospective' in this example?

Please see our answer to Q1 above.

Q3: What are your other examples of retrospective application of rules by the FCA or the FSA?

Provided the FCA is acting within the scope of its statutory authority, it will normally be legitimate for the FCA to publish its clear expectations of firms in connection with a particular rule and then take action against firms or approved persons who fail to meet those expectations. For purposes of regulatory certainty it is important that the FCA respects views taken by firms and approved persons in good faith based on the rules and



guidance which the FCA has issued but with which the FCA may subsequently disagree. We believe that the enforcement action against John Pottage, former head of UBS wealth management in the UK, is an example where the FCA did not observe this principle.

Q4: Do you have any other feedback or suggestions in relation to the issue of retrospection?

As a related, but slightly separate, issue we are concerned about certain aspects of the FCA's current approach to rulemaking, which we believe could lead to a lack of transparency, accessibility and clarity.

In particular, we are concerned about the introduction of material through 'Dear CEO' letters, speeches and other similar means where such material has the force of formal FCA rules or guidance but has not been subject to a consultation process and it is not apparent from the face of the FCA Handbook that such additional material applies.

Whilst we recognise that it is both necessary and desirable for the FCA to communicate its views on topical issues to the industry, there must be a difference between general communications which highlight the FCA's views in a particular area and/or give an indication of future rule changes and the introduction of formal rules which must be observed by firms, the breach of which may lead to enforcement action.

A related challenge for firms is that it is hugely time-consuming for any firm to collate the disparate information on a single topic area from the FCA website. For smaller, less well-resourced firms, this is an impossible task. This is largely down to the poor layout of the website and so is something which the FCA should be able to resolve. We understand from published FCA board minutes that this is an issue on which the practitioner panel has reported to the FCA board.

It is essential that formal requirements are both the subject of consultation and apparent from the face of the FCA Handbook. A move towards rulemaking through speeches and other means is leaving firms uncertain as to how to comply with FCA requirements given that looking at the FCA Handbook no longer paints the whole picture. This fragmentation can make regulatory material inaccessible and leaves firms – and particularly small firms with limited resources – in a difficult position.