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By email

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Consultation Paper CP24/2: *Our Enforcement Guide and publicising enforcement investigations—a new approach*

Dear Nikhil,

I write on behalf of the House of Lords Financial Services Regulation Committee.

Thank you for sending the Committee your consultation on proposed changes to your enforcement guidance. This is the first consultation formally transmitted to us since we notified you that we were the relevant House of Lords committee under Schedule 1ZA of the Financial Services and Markets Act 2000.

The Committee intends to take a thematic approach to its scrutiny of such consultations, commenting on individual instances only where it considers them to be of considerable significance. This is such an example.

Currently the FCA does not normally comment on whether it is investigating an issue and public notice of it appears only when the case has been resolved. The consultation paper proposes changes to how the FCA publicises its enforcement investigations, namely by announcing investigations when they are opened, without prejudice to the outcome. The foreword to the consultation paper justifies the proposal on the grounds of deterrence, not least since publicising investigations will educate the whole sector on the FCA's expectations and indicate where others have fallen short. It also says greater transparency will help to reassure the general public, and drive the FCA's own accountability.

Under the proposals set out in the consultation, we understand that a decision on whether to publicise the identity of a firm under investigation will be taken by the FCA within a public interest framework, weighing a series of factors for or against publication. Factors to be considered under the framework include whether an announcement would benefit the investigation, for example by encouraging whistleblowers to come forward; address public concern; provide reassurance that action is being taken; and deter future breaches. Those against include the impact of publication on other ongoing investigations, the interests of

consumers and the stability of the UK financial system and the ability of the FCA to carry out its statutory functions.¹

The consultation paper explicitly rules out taking account of the impact of disclosure on the subject of an investigation because the FCA considers:

“that assessing if publication of an announcement or update is in the public interest should, while taking account of all relevant facts and circumstances, be primarily focused on promoting our statutory objectives. It should support the relevant investigation and increase our accountability by providing public reassurance that we are acting in the interests of consumers and investors.”²

The proposal rules out normally naming individuals, rather than firms, under investigation, citing requirements under GDPR and the Data Protection Act 2018. But it does envisage publishing names where lawful and necessary for the investigation or for the FCA to carry out one of its statutory functions. This includes encouraging witnesses to come forward or to fulfil accountability to Parliament.³

The FCA has not carried out a cost-benefit analysis of this proposal under section 138I of FSMA because it is “not proposing to make any new rules.”⁴

In our view, this proposal risks having a disproportionate effect on firms named in investigations, where those firms are subsequently cleared of any wrongdoing, particularly given the length of many investigations. This also risks the overall integrity of the market, including through possible unwarranted impacts on share prices for example. Additionally, individuals, whether named or not, may have their reputations unfairly tarnished through association with a publicised investigation. The severity of these impacts will depend on the length of time before a firm or individual is exonerated, where that is the outcome.

In the absence of a cost-benefit analysis it would be helpful, both for us and the wider financial services community, to receive answers to the following questions, in order to assess the likely impact of these proposals.

- 1) How many investigations into a) firms and b) individuals are launched on average per year? How many are currently underway?
- 2) Of closed investigations, what percentage in each category resulted in an adverse finding leading to the FCA taking enforcement action?
- 3) How long, on average, does an investigation take from launch to closure?
- 4) Do you have plans either to reduce the number of investigations or to speed them up? If so, how? What are your targets for each of these?
- 5) What led the FCA to make these proposals? Were they based on any particular representations? If so, from whom?

¹ For the full list see FCA, CP24/2: *Our Enforcement Guide and publicising enforcement investigations—a new approach*, February 2024, paras 3.5 and 3.6: <https://www.fca.org.uk/publication/consultation/cp24-2.pdf> [accessed 18 April 2024]

² *Ibid.* para 3.8

³ *Ibid.* para 3.17

⁴ *Ibid.* Annex 2, para 2

- 6) What consideration have you given to including an appeal mechanism, whereby firms or individuals under investigation can challenge your decision to publicise the investigation before you do so?
- 7) What consideration have you given to thematic, rather than individual, disclosure, in order to meet the public interest benefits of disclosure that you cite?
- 8) Why do you consider that disclosure will more effectively educate the sector than publishing guidance on the FCA's approach?
- 9) Have you performed any analysis on the likely impact of a publicised investigation on the reputation, share price and ability to trade of an affected firm? If so, what were the findings?
- 10) What is your assessment of the impact of this proposal on the relationship between regulators and the industry more generally?
- 11) How does this proposal compare with the approaches taken by other supervisors internationally (other than the Monetary Authority of Singapore)?

More fundamentally, it seems unhelpful to have proposed these changes without an accompanying assessment of their likely impact. This proposed guidance is to be issued under section 139A of FSMA and therefore a cost-benefit analysis is not required. However, we note the following point from your February 2024 statement of policy on cost-benefit analysis:

“it is our policy to produce a [cost-benefit analysis] for general guidance about rules if a high-level assessment of the impact of the proposal identifies an element of novelty, which may be in effect prescriptive or prohibitive, that may result in significant costs being incurred.”⁵

What consideration did you give to carrying out a cost-benefit analysis in this instance?

I would appreciate a response to these questions by 25 April. I note that the consultation formally closes on 30 April: the Committee intends to take evidence on this proposal and asks that you do not take further steps to implement this change until it has had the opportunity to do so and reach a final conclusion.

Yours sincerely,



Lord Forsyth of Drumlean,
Chair, Financial Services Regulation Committee

Members of the Committee have declared interests in relation to financial services. They are published on the Committee's webpage, [here](#).

⁵ FCA, *How we analyse the costs and benefits of our policies*, February 2024, para 2.8: <https://www.fca.org.uk/publication/corporate/how-we-analyse-costs-benefits-policies-2024.pdf> [accessed 18 April 2024]