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Rt Hon. the Lord Forsyth of Drumlean
Chair, Financial Services Regulation Committee
House of Lords
London
SW1A 0PW

27 November 2024

Our Ref: 241104B

Dear Lord Forsyth,

RE: Greater transparency of enforcement investigations: CP24/2 Part II

Ashley and I were very grateful to participate in your recent evidence session on our enforcement guidance consultation.

As I indicated when we met, we will tomorrow begin a second phase of consultation. This follows extensive engagement, including over 40 meetings with the industry and interested stakeholders, well beyond the original consultation deadline. Tomorrow's publication includes setting out areas where we think we should adapt our proposals and greater clarity through data and case studies on how the proposals would work in practice. We are grateful for the engagement we have had from a range of stakeholders and we hope to continue that discussion before deciding on the proposals in the first 3 months of next year. I have included a copy of the document we plan to publish – I would be grateful if you could keep this confidential until the embargo lifts at 11am tomorrow.

I have set out below responses to the Committee's follow up questions.

Over the previous 10 years, how many cases of authorised firms would have been disclosed under your proposed framework?

We have not looked this far back as part of developing this policy. Our proposals for increased transparency go hand in our hand with our proposals for the increased focus and pace of our investigations. We are setting out a fundamentally different approach to enforcement, and so there are limits to how far we could meaningfully apply the policy retrospectively.

The policy will not apply in full to our existing portfolio but, for illustrative purposes, we do set out in tomorrow's update further information on how this policy would apply to types of live cases.

As of 28 November 2024, there are 41 open investigations into regulated and/or listed or publicly traded firms, of which:

- 23 are in the public domain (15 were made public by the firm, we made 6 public during the investigation stage and we made 2 public through our formal statutory processes around the publication of Warning Notice Statements and Decision Notices)
- Of the 18 open investigations not in the public domain, 3 are likely to close or settle by mid-2025.

Of the remaining 15:

- 6 are covert or involve sensitive information which we believe would not be in the public interest to announce
- 2 where there may be public interest factors in favour of announcing but, for other reasons, we consider it very likely that any announcements would be on an anonymised basis
- 7 where there may also be public interest factors in favour of announcing but in these cases very possibly on a named basis.

Of the 7 in the last category above:

- 6 are subject to public supervisory action or previous enforcement action. 2 of these involve affiliated firms in the same group. There have been requests for information from MPs relating to 3 of the firms.
- 1 involves a firm in administration – and we expect the administrator may make the investigation public at some point as part of its reporting to creditors.

In the coming months, it is possible that some firms may make their own disclosures, which will further reduce the number of undisclosed cases.

When we wrote to the Treasury Select Committee on 7 May 2024, we noted that in 2023/24 we had opened 11 investigations into regulated firms. We stated that the fact of our investigation had been made public in 6 cases, 1 by us and 5 by the firms themselves. Following further disclosures by firms under investigation and settlement of cases, only 3 cases opened in 2023/24 into regulated firms are not currently in the public domain. We anticipate that 2 of these cases may become public, through settlement, in the first half of 2025.

Overall, we anticipate opening 10-12 enforcement investigations into regulated firms each year and we would expect the new policy to apply to only a subset of these, so a very small number of regulated firms.

Can you share the data which Nikhil noted for the Committee, specifically that FCA research evidenced that its disclosure framework would encourage whistleblowers to come forward with cases of non-financial misconduct.

Can you share data on the impact this would have on encouraging whistleblowers generally to come forward, for example external evidence from the FCA's own research?

In 2023, we published our Whistleblowing Survey[1], which was based on qualitative data from a small sample of recent whistleblowers who disclosed their concerns about wrongdoing to us. The survey was conducted in early 2022 to understand whistleblowers' experience of reporting to the FCA and to capture a range of views about their experience.

While we offer to keep whistleblowers updated on what we do with their information, our survey found that, on the whole, they were dissatisfied with the information we were able to share. There are significant constraints – including legal ones – on what we can tell whistleblowers about how we have used their information. Respondents told us that the updates we have been able to provide "lacked substance", that "no real information was given" and that they "didn't say if the FCA was investigating or not". This led to a concern that their reports had been "brushed aside" or that there were "no real consequences" for wrongdoers.

Some whistleblowers who responded to our survey said that they would not make whistleblowing reports to the FCA in future, for reasons including a "failure to engage", because they had "no idea what has been done", there was "no report of the outcome", "no actions were undertaken by the FCA", and "it was not investigated properly".

The measured increased in transparency we are suggesting would mitigate but not solve all these issues. For example, there may still be legal constraints which prevent us sharing detail about our supervisory engagement in response to whistleblowing reports. But being able to demonstrate that we are investigating, where it is in the public interest to do so, may help to reassure whistleblowers in some cases that we do take action based on their information, helping to demonstrate that it is worthwhile to make a report. Furthermore, confirming we are not investigating may also help provide finality for whistleblowers even if that decision is not always a welcome one from their perspective.

More specifically on non-financial misconduct, in the month of July 2023 we confirmed[2] (following requests from the Treasury Select Committee) our investigation into Mr Odey. That month saw a significant increase in the number of whistleblowing reports we received concerning sexual harassment. While it would not be appropriate for us to give

[1] https://www.fca.org.uk/data/whistleblowing-qualitative-assessment-survey-2022
[2] https://committees.parliament.uk/publications/40749/documents/198516/default/

exact figures because of the potential risk of identifying individuals, we can share that we received almost triple the number of reports in July compared to the 2023 monthly average.

Further detail on how the public interest framework would work

We have listened carefully to the feedback and the concerns raised about these proposals. In tomorrow's updated consultation we are setting out a much more detailed public interest test, as well as more data and case studies detailing how we could make announcement decisions. The case studies also help demonstrate why we felt that the current "exceptional circumstances" test is not working.

We are making 4 significant changes to our initial proposals:

1. Proposing that the impact of an announcement on the relevant firm will form part of our public interest test and be central to our consideration of whether to announce an investigation and name a firm.
2. Suggesting we give firms a copy of any draft announcement and 10 business days' notice to make their representations to us, with a further 2 business days' notice of publication of any announcement if we decide to proceed after taking these representations into account. Originally, we had proposed only 1 day. The new proposed period will also give firms time to consider whether they want, or are required, to make an announcement themselves or make representations that they should be able to do so, for example on a timetable aligned with their wider financial announcements.
3. Including the potential for an announcement to seriously disrupt public confidence in the financial system or the market as a new factor in the public interest test.
4. Making it clear that we will not make proactive announcements of investigations that are already ongoing when any proposals come into effect. So these proposals will apply only to proactive announcements of investigations opened after the proposals come into effect. We may reactively confirm ongoing investigations which are already in the public domain, where this is in the public interest. The exceptional circumstances test will continue to apply to any potential proactive announcements in relation to the existing portfolio of investigations.

The Committee would be grateful if the FCA could follow up on additional information regarding why it considers its disclosure framework is comparable to approaches taken in Singapore. The Committee would also be grateful if Nikhil could follow up on his discussion point regarding comparisons with the SEC in the US.

We recognise that, while a number of other UK regulators announce their investigations, internationally few financial services regulators do. However, no other regulator around the world has the same breadth of responsibilities we have.

Our remit is unique when compared to international counterparts in terms of our breadth and the range of partners we work with domestically and internationally, going significantly beyond the purely financial services regulation which is typically the case in other jurisdictions.

There are also expectations around accountability which are unique to the UK among other G7 countries. We are regularly asked by politicians and parliamentary committees about where we are investigating specific issues.

Different systems play a part. For example, some international counterparts undertake enforcement action through open court, where regulatory concerns play out in public before a judgement is made.

And unlike some other jurisdictions, we typically open investigations into those we regulate only after extensive supervisory engagement, generally giving firms considerable time to resolve issues before moving to enforcement.

There are also specific features of US regulations which can lead to greater disclosure of regulatory investigations. Firms which are issuers of securities listed or traded on a UK or EU public market are subject to the Market Abuse Regulation (MAR). If the fact or scope of an FCA investigation is likely, if public, to have a significant effect on the price of those securities, these firms must, in compliance with MAR, disclose it to the market as soon as possible once informed of it by the FCA.

Firms do not, however, always disclose our investigations under MAR. This could be because firms consider that there is insufficient certainty as to the outcome of the investigation, for example whether there is genuinely the prospect of a significant sanction or redress requirement, to trigger the disclosure obligation. There may also or instead be other reasons, including the size of the firm or its group, that lead the firm to consider that the fact of an FCA investigation is not likely to have a negative impact on the price of its securities. We engage appropriately with relevant firms on these assessments.

In addition to or instead of their disclosures under MAR, firms may disclose investigations in their public annual reports in compliance with relevant UK accounting standards. The relevant accounting standards do not apply just to listed firms and other public issuers and are not tied to the impact on the price of securities. In some cases, however, firms may legitimately disclose an investigation without naming the FCA or describing the scope of the investigation. In addition, firms may postpone public disclosure until required to publish their next annual report.

By contrast, firms which are subject to relevant US federal securities laws as public issuers – which include a number of FCA-regulated firms – are required to file at least

quarterly public reports with the SEC, with disclosure requirements which go beyond those in MAR.

These public reports must include any material legal proceedings known by the firm in question "*to be contemplated by governmental authorities*". It is the SEC's practice to notify firms under SEC investigation when SEC Enforcement intend to make an internal recommendation of such proceedings. Our understanding is that this step is widely regarded as triggering this disclosure obligation, at least where the relevant investigation is by the SEC.

It is also common for firms to publicly disclose regulatory investigations in their SEC filings long before any resulting proceedings are contemplated. Our understanding is that they take that course in compliance with additional requirements imposed by US federal securities laws. These include the public disclosure of the firm's most significant risk factors and information necessary for an understanding of its financial condition and the results of its operations. This includes events or uncertainties reasonably likely to result in a material reduction in liquidity. We understand that, depending on the facts, this obligation is interpreted to potentially capture even just the costs to the firm of the relevant investigation. Such early investigation disclosures in SEC filings commonly attract media attention – see the links here[3], here[4], here[5], here[6], here[7] and here[8] for examples over recent months.

For completeness, US stock exchanges impose additional obligations, requiring more timely public disclosure but only, like MAR, of market-sensitive information. The New York Stock Exchange (NYSE) requires, for example, that a firm listed on the NYSE should "*release quickly to the public any news or information which might reasonably be expected to materially affect the market for its securities*". The NASDAQ similarly requires firms to "*make prompt disclosure to the public … of any material information that would reasonably be expected to affect the value of its securities or influence investors' decisions*".

With regard to Singapore, the Monetary Authority of Singapore has a policy[9] based on disclosure in the public interest - factors in favour include those investigations with

[3] https://www.legaldive.com/news/wells-fargo-aml-sanctions-inquiry-investigation-sec-filing-td-hsbc-10q/723233/

[4] https://theloadstar.com/sec-investigates-csxs-accounting/

[5] https://www.msn.com/en-us/money/markets/sunpower-plunges-as-auditor-resigns-sec-subpoena-disclosed/ar-BB1ptP4J?apiversion=v2&noservercache=1&domshim=1&renderwebcomponents=1&wcseo=1&batchservertelemetry=1&noservertelemetry=1

[6] https://www.globenewswire.com/news-release/2024/11/21/2985396/32716/en/iLearningEngines-AILE-Crashes-After-Company-Places-CFO-on-Leave-Auditor-Withdraws-Opinions-SEC-Subpoenas-Company-Hagens-Berman.html

[7] https://www.marketwatch.com/story/acadia-healthcares-stock-plunges-after-government-probe-into-patient-care-f2d3f9c6

[8] https://www.msn.com/en-us/money/companies/innodata-receives-subpoenas-from-doj-sec-related-to-ai-claims/ar-AA1tKtMV

[9] https://www.mas.gov.sg/-/media/mas/news-and-publications/monographs-and-information-papers/enforcement-monograph-final-revised-apr-20221.pdf

widespread implications for consumers, or where there is a need to address reputational risk. The Australian Securities and Investments Commission (ASIC) also has a longstanding policy[10] that it may make a statement about an investigation when it is in the public interest to do so. ASIC balances that public interest benefit against the potential for prejudice to individuals who are the subject of an investigation and other factors which weigh against disclosure.

Cost benefit analysis

A number of stakeholders requested a cost benefit analysis (CBA) of the proposals. Legislation requires us to provide CBAs for new rules, and it is our policy to produce a CBA for guidance on rules. These proposals do not relate to rules or guidance on rules and they do not impose rules on regulated firms or others or require them to take any particular steps. They would impact a very small number of regulated firms, and impose no direct costs on other regulated firms. The potential impacts on firms which we do name will be specific to the circumstances – and the 10-day period we have proposed would give them the opportunity to make representations on that impact, which we would take into account when weighing up the decision on whether to make an announcement. Further information on our approach to CBAs can be found in our Statement of Policy.[11]

We have however included information in our second phase consultation document to understand the potential implications of our proposals. This includes analysis of the number of firms impacted and information about the likely number of proactive announcements under our proposals. We also provide evidence about the proportion of FCA investigations already in the public domain together with empirical evidence on how share prices move following regulatory investigation announcements. We welcome any further data and evidence from respondents on these issues.

In addition, we will also be considering whether and how to take forward suggestions put forward by respondents which might also help us achieve the key aims of the proposals, namely transparency, education and deterrence. This includes thematically publishing concerns we have about what we are seeing in the market. It could have particular benefits where, under our proposals, it might be appropriate to disclose an investigation but not name the firm involved.

Finally, we wanted to clarify one data point from our first response to you on this subject on 25 April 2024. We set out that we had identified 7 instances where there was some firm disclosure by a listed firm in the UK of an FCA investigation opened between 2021 and end of April 2024 inclusive. While we were undertaking data validation for the next

[10] https://asic.gov.au/about-asic/asic-investigations-and-enforcement/public-comment-on-asic-s-regulatory-activities/#our-general

[11] https://www.fca.org.uk/publication/corporate/statement-policy-cba.pdf

phase of consultation, we found that this number is in fact 6, as one of the cases was opened prior to 2021 and should not have been included. The additional consultation contains the corrected data set under the section headed "Market value" at page 22.

We have not taken any final decisions yet on whether or how to implement these proposals. That will only come following further engagement with Parliament, industry, consumer groups and others impacted by these proposals. My colleagues and I look forward to hearing your views.

Yours sincerely

Nikhil Rathi
Chief Executive