Bryan Cave Leighton Paisner LLP – Written evidence (EGC0016)

1 INTRODUCTION

1.1.1 We submit this response on behalf of Bryan Cave Leighton Paisner LLP ("**BCLP**") in response to the House of Lords' Financial Services Regulation Committee's (the "**Committee**") Call for Evidence regarding the FCA's Consultation Paper 24/2.

1.1.2 BCLP is a fully integrated global law firm. Our London office provides full-service legal advice in the City, throughout the UK and worldwide. Amongst our clients are FCA regulated firms. As such, we felt a duty to our clients and the financial services industry generally to respond to CP24/2, especially the FCA's proposals to announce that it has opened enforcement investigations into firms where it considers this to be in the public interest. A copy of our submission to the FCA in response to questions 1 to 6 in CP24/2 is available here.

1.1.3 As set-out in that response, we, like many others including your Committee, have serious concerns with the FCA's proposals to announce. In this response, we focus on both the legal and practical impact of the proposals. Recognising that the FCA's proposals appear to have become somewhat of a moving feast since the publication of CP24/2, we also seek to address points made by the FCA's Co-Executive Directors of Enforcement and Market Oversight in recent correspondence with your Committee[1] and the Treasury Committee[2] (the "**Correspondence**"), as well as the recent comments made by Ms Chambers in her speech delivered to the AFME Annual European Compliance and Legal Conference on 24 September 2024 (the "**AFME Speech**")[3].

1.1.4 We do, however, appreciate the FCA's laudable objective of achieving greater transparency in relation to its enforcement investigations. We also, therefore, suggest some ways in which the proposals could be modified to achieve a better balance between the FCA's aspirations and the rights of FCA regulated firms.

[1] Letter from Therese Chambers and Steve Smart, FCA, to the Committee dated 25 April 2024

[2] Letter from Therese Chambers and Steve Smart, FCA, to the Treasury Sub-Committee on Financial Services Regulations dated 7 May 2024

[3] Change for the better: the FCA's evolving approach to enforcement | FCA

2 LEGALITY OF THE FCA'S PROPOSALS

2.1.1 We detail our concerns with the legality of the FCA's proposals in our response to the FCA (here). We do not repeat these points in full in this response to the Committee, but summarise the key points below.

2.2 Section 1B FSMA: General duties

2.2.1 The FCA is required to discharge its functions in a way that advances one or more of its operational objectives. In this regard, CP24/2 asserts that the FCA's proposals will assist in supporting the following objectives: (a) protecting customers from bad conduct; (b) protecting the integrity of the UK financial system; and (c) facilitating the international competitiveness and growth of the UK economy. In respect of the latter two objectives, our view is that, far from advancing these objectives, the net effect of the FCA's proposals will be to detract from them.

2.2.2 Critically, the FCA's proposed public interest test currently appears to be almost entirely one-sided, with paragraph 3.8 of CP24/2 expressly stating that firms' interests have been deliberately excluded as a "specified factor" in the test. The one-sidedness of the public interest test is further compounded by the FCA's proposal to give firms no more than one business days' notice of its decision to announce an investigation, providing almost no opportunity to challenge that decision.

2.2.3 The potential for firms to suffer significant prejudice as a result of the FCA's proposals, not least reputational damage, therefore seems obvious. Moreover, that prejudice will, in many cases, likely have been unwarranted in circumstances where the FCA has confirmed in the Correspondence that 67% of enforcement investigations against firms are discontinued without further action.

2.2.4 In light of this, there could be significant implications for the orderly operation of the UK financial system. For, example, where firms hold client assets or investments, there is a real risk that the announcement of an FCA investigation could lead to a "run on the bank" scenario, causing firms to unnecessarily fail. Exposing firms to announcements of investigations, in relation to which their interests are not properly taken into account and which may potentially be dropped at a later date, will also detract from the FCA's objective of improving the competitiveness of the UK economy.

2.2.5 Fundamentally, our view is that to achieve the correct balance, firms' interests need to be considered as a primary factor in the

public interest test. This appears to be a point that the FCA is now beginning to recognise, following the responses it has received to CP24/2. We welcome Ms Chambers' apparent acceptance in her AFME Speech that the "*potential impact on the firm*" must be a "*clearly defined criteria*" in public interest test, and her confirmation that the FCA will publish case studies later in the autumn to demonstrate how the public interest test might apply. We also welcome Ms Chambers' confirmation that the FCA has "*heard clearly*" firms' concerns that they will not have sufficient time to make representations on proposed FCA announcements. These reassurances are, however, currently at odds with the proposals as currently formulated in CP24/2. We, therefore, await fuller details of the FCA's revised proposals before we can consider whether they properly address our concerns.

2.2.6 Finally, whilst we acknowledge that the FCA's proposals go some way towards advancing its consumer protection objective, the position here is not necessarily as clear-cut as it suggests. For example, where multiple firms are suspected to have been involved in misconduct, the announcement by the FCA that it has commenced an investigation into one of those firms may be misleading to consumers in circumstances where it later intends to commence investigations into other firms.

2.3 **Sections 207 and 208 FSMA: Restrictions on public censure**

2.3.1 In our view, there is a real risk that the format of early announcement proposed by the FCA will in effect amount to a "public censure" of firms within the natural meaning of the term in Sections 207 and 208 FSMA, but without the relevant procedural safeguards. We highlight the then FSA's own summary of the purpose of these provisions in Discussion Paper 08/3 as *"specifically built into FSMA in order to prevent the casual, rash or unchallenged use by the regulator of public statements that could damage a financial services firm's reputation and commercial standing… It follows that calls by some for us to 'name and shame' firms as a matter of course is not the approach envisioned by Parliament and is not one we can readily meet under FSMA* ".

2.3.2 We welcome the FCA's confirmation in the Correspondence that they are open to alternatives to "naming and shaming", including an anonymised publication via *"an 'Enforcement Watch' publication which sets out an overview of enforcement activity"* and/or *"thematic disclosure".*

3 PRACTICAL CONSIDERATIONS

3.1 A deterioration in the FCA's relationship with firms

3.1.1 We consider that the FCA's proposals will lead to a material deterioration of the relationship between the FCA and the firms that it regulates, with that relationship becoming more adversarial. This would not be limited to enforcement investigations, but, we fear, lead to a break-down in the supervisory relationship.

3.1.2 We expect that the proposals will cause firms to become more cautious in the disclosures that they make to the FCA, in circumstances where such disclosures might lead to the immediate public announcement by the FCA of an investigation into the issues concerned.

3.1.3 In addition, we anticipate that the FCA's proposals will lead to an uptick in firms electing to "leapfrog" the FCA's more collaborative RDC process and opting to take enforcement cases straight to the Upper Tribunal. That is because, in circumstances where details of an investigation are already in the public domain, the benefit of resolving matters in a confidential forum is largely removed. We fear this will lead to longer, more costly and increasingly adversarial enforcement investigations.

3.2 Risks for individuals

3.2.1 It is our belief that the content of the FCA's proposed announcements in relation to firms will, in many (if not most) instances, make it obvious that the FCA will be looking into the conduct of certain individuals (for example, in an AML investigation it will be obvious that the FCA will be examining the conduct of the MLRO). The risk of this occurring is particularly heightened at smaller firms.

3.2.2 As the FCA readily acknowledges, individuals have rights pursuant to the ECHR and UK GDPR which the FCA is prohibited from infringing. Section 393 FSMA grants individuals "third party rights" if they are prejudicially identified in an FCA warning or decision notice. In stark contrast, the FCA's proposals currently offer no equivalent protections in the context of its proposed announcements. The impact on individuals could be significant. The proposed announcements may well fuel speculation about individuals among their colleagues, in the press and across the market generally. This could have a serious impact on their ability to stay in post, their future employment prospects and their mental health, all in circumstances where they may not even be

under investigation by the FCA or may be subject to an investigation that is discontinued.

3.2.3 We welcome the FCA's confirmation in their letter to the Committee that their *"proposals also recognise that there are specific legal considerations when publishing information about individuals, and so we propose to maintain our policy of not usually announcing that we are investigating a named individual. This will also be part of our consideration where naming a firm would almost certainly result in the naming an individual"*. However, if this is the FCA's position, this needs to be built into its proposals in more detailed and express terms. It would also be helpful if the FCA could address in its forthcoming case studies its approach to assessing the likelihood of the market correctly (or indeed incorrectly) identifying connected individuals.

3.3 **Litigation risk**

3.3.1 We are concerned that the early announcement of investigations by the FCA will lead to a further increase in the number of mass claims brought against FCA-regulated firms. With claimant law firms in competition to build books of claims they will, no doubt, seize on early announcements by the FCA to commence premature and speculative claims against firms, rather than waiting for it to reach conclusions. This will be detrimental to firms, particularly if the FCA later closes its investigation without further action.

3.4 **Other practical issues**

3.4.1 We understand from paragraph 3.31 of CP24/2 that, if the proposals come into force, the FCA intends to announce not only new investigations into firms, but also ongoing investigations where that meets the public interest test. We are concerned about the fairness of this for firms facing ongoing investigations who have, to date, been dealing with the FCA on the reasonable expectation that the investigation would remain confidential.

3.4.2 We also remain unclear on the following points (which we hope the FCA may clarify in its forthcoming case studies):

(a) When the FCA would announce the opening of a new investigation;

(b) Whether firms will be permitted to make their own announcement if the FCA does so;

(c) What content the FCA proposes to include in the investigation updates referred to in paragraph 3.27 of

CP24/2 and the investigation closure announcements referred to in paragraph 3.29. Will these simply state that the investigation has been discontinued or will these contain further detail as to the reasons for discontinuance? Will firms be able to make input into the drafting of these announcements?

4 NEXT STEPS AND FURTHER ENGAGEMENT

4.1.1 We recognise and appreciate the FCA's desire to achieve greater transparency, as part of their wider efforts to achieve effective enforcement. We also welcome the FCA's confirmation in its letter to the Committee and in Ms Chambers' AFME Speech that it will continue to engage with stakeholders to achieve the "*right solutions*". Whilst we appreciate the FCA's desire not to "*rush into any decisions*", we would, however, like to see the FCA set out a clearer timetable as to how it intends to take this matter forward, given the significant uncertainty that has been created for FCA-regulated firms.

4.1.2 As stated at the outset of these submissions, the FCA's approach to these proposals has been somewhat of a moving feast, with an evolving approach emerging at different events over time. That is not a criticism of the FCA, but if it intends to pursue these proposals, we would ultimately like to see a new Consultation Paper being published, to enable the industry to meaningfully comment on its evolved position. That Consultation Paper should include:

(a) alternative options to achieve the FCA's intended transparency using anonymised announcements;

(b) broader factors that the FCA takes into account in deciding whether to announce or provide updates on an investigation, including the impact on firms and identifiable third parties;

(c) provision of credible and fair mechanisms for firms and identifiable third parties to make representations prior to the FCA publishing any announcement in relation to an investigation, akin to the process used by the RDC in respect of Warning Notice statements;

(d) details of the wider process and procedural safeguards they intend to follow to integrate this into their enforcement investigations; and

(e) a full cost-benefit analysis.

10 October 2024