# City of London Law Society Regulatory Law Committee – Written evidence (EGC0018)

## Introduction

1. The City of London Law Society ("**CLLS**") represents approximately 17,000 City lawyers through individual and corporate membership, including some of the largest international law firms in the world. These law firms advise a variety of clients from multinational companies and financial institutions to Government departments, often in relation to complex, multi-jurisdictional legal issues. This response to the call for evidence has been prepared by the CLLS Regulatory Law Committee (the "**Committee**" or "**we**"), a list of whose members can be found on the CLLS website.

2. We welcome the opportunity to present our views on the proposals contained in the FCA's consultation paper ("**CP 24/2**"). Our submissions will focus only on the FCA's proposal to publish announcements and updates about enforcement investigations where these relate to firms rather than individuals.

3. We are responding to this call for evidence as we have material concerns with the FCA's proposed new approach to publish announcements and updates about enforcement. We consider that the policy as presented is ill-conceived, lacks justification, and, if implemented as envisaged, is likely to risk undermining confidence both in regulated firms and the FCA as an institution. Our concern is that these changes are proposed without due consideration of their likely adverse impacts, and without giving due consideration to whether similar objectives could be achieved through proportionate means with less risk to market confidence and integrity. Our observations on the proposal and its likely impacts are set out in more detail below.

## Our observations on the proposal and its likely impacts

## (A) Destabilising and undermining of confidence in regulated firms

4. While recognising that it is desirable for regulators and public authorities to be transparent in their policy approaches and operational arrangements, transparency in the context of enforcement must be balanced against the consequences and ramifications of transparency.

5. CP 24/2 proceeds on the basis that increased transparency should also extend into situations where investigations have been opened but no conclusions reached. A formal publication issued by the FCA relating to a regulated firm will typically have the effect of causing concern around,

and undermining confidence in, that institution. Historical and recent policy initiatives show that market confidence can be materially adversely affected by FCA public statements identifying market or firm specific concerns. Those impacts will not be mitigated through standard form disclaimer text in a public announcement.

6. Further, the FCA indicates that it would not intend to apply the new policy approach in relation to enforcement action against individuals, which is clearly appropriate, but the FCA fails adequately to consider the impact that the new approach could have on senior managers within firms that are subject to an announcement. We are surprised and concerned that the FCA fails to identify and consider the impact of early announcement on those senior managers, given that this may be particularly pronounced in relation to board members of listed groups and in relation to executive team members of smaller firms and sole traders (where such individuals have particular prominence).

7. We are concerned that the FCA has improperly and irrationally failed to take into account these relevant considerations in seeking to extend its well-intentioned transparency initiative in this inappropriate way. The Committee's concerns are not purely focused on or limited to the FCA causing potentially undue reputational damage to regulated firms – our concern runs deeper, and is better viewed through the lens of the FCA pursuing a policy initiative that disproportionately and without proper justification could undermine confidence in regulated firms, thereby destabilising some or all of the UK regulated financial sector.

## (B) Disproportionate, irrational and justified on false premises

8. We note the FCA's justification for its proposed new approach is based on transparency, not just in relation to regulatory processes generally, but also using transparency as a tool for effective regulation, as a means of maintaining market confidence in the FCA's activities, and even as a mechanism for deterrence.

9. We submit that the FCA's evaluation irrationally fails to take into account the full consequences of extending transparency to cover the new approach and fails to assess the potential benefits identified by the FCA against the harms that may arise from or be caused by increased transparency. As explained above, the new approach could have extensive and adverse disruptive effects on regulated firms and the financial services sector in the UK. The FCA should reasonably consider whether there are alternative measures that could achieve the desired effects without causing the harms likely to arise from the current proposal. In our view, it would be more effective and proportionate for the FCA to present on an aggregated and anonymous basis current concerns and trends arising from their investigations.

10. Moreover, certain of the bases used in favour of the transparency provided by the new approach lack credibility. It is highly unlikely that the announcement of an investigation into a particular firm, given the limited nature and depth of information capable of being included at that time, can provide any meaningful educational value. More appropriate and effective means of providing education on the FCA's policy and approaches are through the FCA's existing communication routes (including Dear C-Suite letters, Statements of Policy and Guidance) and through enforcement notices.

11. Similarly, the Committee sees no basis for the FCA's assertion that the new approach will operate as an effective deterrent. The combination of the Senior Managers & Certification Regime framework creating individual accountability, supervisory intervention powers (including the increased use of s.166 Skilled Persons Reports by the FCA), and the threat and existence of investigations and enforcement action provide meaningful deterrence. The additional possibility of having an investigation announced publicly at an early stage does not appear to us to enhance those deterrents in any meaningful way.

**(C) Adverse impacts on market stability**

12. In cases where the existence and circumstances surrounding the enforcement investigation may constitute market sensitive information for listed firms, it is for the listed firm to properly follow its disclosure processes and to arrange for the release of any inside information in accordance with Article 17 of the UK Market Abuse Regulation (the "**UK MAR**"). Where the investigation is not subject to an immediate market announcement as inside information under the UK MAR, listed financial services groups may in any event decide or be required to include information concerning a regulatory investigation in their annual report or other public disclosures. Where this is the case, any such decision is taken following thorough governance and oversight, often with consultation with relevant regulatory authorities, and with careful scrutiny and planning for the questions that may arise from investors. The FCA's proposal that firms be given "no more than" one business day to consider a public announcement of an investigation materially fails to appreciate and acknowledge the level of planning and care that is needed with any such disclosure.

13. We would note that the proposals will also impact listed companies that are not regulated as financial services providers, for example when they are subject to investigation for market abuse or breach of the Listing Rules and the Disclosure Guidance and Transparency Rules. The failure by the FCA to adequately take into account the adverse impacts that this policy may, if exercised, have on financial market stability for listed financial services groups is of great cause for concern.

## (D) Inadequate "public interest" safeguards

14. Parliament has made clear the appropriate stage at which publicity of investigation and enforcement action may be communicated. Under the relevant provisions of the Financial Services and Markets Act 2000, firms are afforded protections ahead of publication (including consultation with the persons to whom the notice is given and specific protections where publication would be unfair to those persons) and third-party rights are also conferred on those that are identified in relevant notices. These statutory protections are reinforced by the FCA's Enforcement Guide which states that the publication decision will be taken by the Regulatory Decisions Committee (**RDC**) after consultation with the subject of the notice, who will normally have 14 days to respond and the opportunity to address the RDC in person. The FCA's proposed new approach disregards that timing and the safeguards around it, without consideration or justification. Given the protections provided by statute and the FCA rules at the point where the FCA has conducted and largely concluded an investigation into a possible contravention of the FCA rules, it is wholly improper and irrational for the FCA to adopt an approach which provides very limited meaningful protections in cases where the FCA is at the early stages of conducting an investigation.

15. The Committee acknowledges that the policy intent would be for any decision to publish (and as to whether publication is on a named or anonymous basis) to be made on a case-by-case basis, applying the public interest framework. The proposed "public interest" safeguards set out in CP24/2 are expressed in terms that enable broad scope for application and interpretation, such as justification based on "*providing reassurance that [the FCA] is taking appropriate action*". In contrast, those protective provisions against publication are drawn narrowly and would appear to set a high bar to conclude that publication is not appropriate. As such, the public interest framework as proposed is weighted strongly in favour of publication and fails adequately or clearly to enable scope for regard to be had to the significant harms that could arise from publication.

## (E) Adverse impact on international competitiveness

16. Since the publication of CP24/2, a number of our committee members have surveyed their global networks to assess whether there is any international comparator approach by non-UK regulatory authorities. The results of that exercise are clear. It is not the international norm for regulators to announce the opening of an investigation, nor to provide updates on the progress of existing investigations. In the very small number of jurisdictions where the power exists to announce the opening of an investigation, we found that the power is used in

practice only in extremely limited and exceptional cases.

17. Committee members have sought informal views from across international financial institutions, and the feedback received is equally clear. The strong feedback is that this policy change would be a disincentive to operating in London, and thereby may have a significant adverse impact on the international competitiveness of the UK.

18. This being the case, the FCA has failed to substantiate its assertion that the new approach is compatible with advancing the competitiveness of the UK economy. We appreciate that the international competitiveness and growth objective is secondary but it still needs to be given due consideration.

**(F) Undermining confidence in the FCA**

19. The Committee recognises and generally supports the efforts being made by the FCA to address the enforcement backlog and to increase efficiency in investigation and enforcement decision making. Similarly, we support the efforts by the FCA to ensure that it is held accountable for ensuring that it operates in a fair and efficient manner.

20. However, on balance it seems unlikely that the new approach will in fact lead to more efficient and timely case management. In reality, the announcement of the opening of enforcement investigations will result in more questions from the public, the media and Parliamentarians, challenges to the FCA's objectivity and fairness and further criticism both of the length of investigations and the number which are closed without further action. Greater transparency of the speed of conclusion of investigations by the FCA and as to the number and nature of investigation cases that are commenced and subsequently dropped may also serve the contrary unintended consequence of undermining confidence in the FCA.

21. The FCA's enforcement division appears to continue to face a number of operational challenges and successful challenges to its decision making (both through the Regulatory Decisions Committee and the Tribunal). We respectfully submit that market confidence in the FCA is better served by the FCA continuing to address legacy operational challenges and producing thoughtful, detailed and comprehensive warning notices and final notices that set out facts and consequences.

**Conclusion**

22. For the reasons set out above, the Committee's firm view is that the proposed new approach should not be progressed at least in its current form and without further detailed consideration together with industry.

We hope the above feedback has been useful. If you would like to discuss any of these comments then we would be happy to do so.

*10 October 2024*