International Underwriting Association – Written evidence (EGC0022)

The International Underwriting Association of London (IUA) represents international and wholesale insurance and reinsurance companies operating in or through London. It exists to promote and enhance the business environment for its members. The IUA's London Company Market Statistics Report shows that overall premium income for the company market in 2022 was £44.071bn. Gross premium written in London totalled £37.626bn while a further £6.444bn was identified as written in other locations but overseen by London operations. For further information about our organisation and membership, please visit our web site, www.iua.co.uk, under the section "About the IUA".

The IUA welcomes the opportunity to provide feedback to the House of Lords FSRC on the proposed changes outlined in FCA CP 24/2: Our Enforcement Guide and Publicising Enforcement Investigations, on behalf of its members ('we').

Our members strongly oppose the FCA proposal to announce its investigations, including the names of the subjects. While we acknowledge the FCA's intention to enhance transparency and public trust, we wish to express our firm reservations regarding the potential negative impact of these proposals. The current proposals are seen as disproportionate to the potential harm the FCA aims to mitigate and contrary to the FCA's secondary international and growth competitiveness objective ('SIGCO'). There are several legal and practical concerns that drive the objections to this proposal, including:

Detrimental Effect on the Market and Firms:

Publicly disclosing the names of subjects or firms under investigation could lead to market speculation, reputational damage, and investor panic. This could harm business operations, reduce investor confidence, and cause share prices to plummet, contradicting the FCA's SIGCO. The mere association with an investigation could damage a firm's market standing. The FCA has other powers to achieve the same effect without fostering a culture of 'name, shame, and potentially false blame.'

Presumption of Innocence under Criminal Law:

The principle of "innocent until proven guilty" ensures individuals are not treated as guilty until proven so by a court. This concept, dating back to the Magna Carta of 1215 (clauses 39 and 40) and reinforced by Article 6 of the Human Rights Act 1998, guarantees a fair trial. Publicly naming individuals before an investigation concludes risks undermining this right, leading to unverified information and negative media coverage. The FCA's proposals may create a prejudicial environment, denying due process and presuming guilt, thus contradicting justice and fairness principles.

Commercial and Contractual Implications:

Commercial relationships are built on trust and confidentiality. Disclosure of ongoing investigations could result in:

Irreparable Reputational Damage:

Public disclosure of investigations could cause significant and long lasting reputational harm to companies and individuals, even if they are later found innocent. For example, individuals seeking new employment might be rejected by prospective employers due to the investigation's stigma, regardless of their qualifications and suitability. Further, individuals not subject to the investigation could also be tarred by association. The FCA needs to address how it would compensate firms or individuals for the irreparable reputational damage.

Stock Market Impact:

Premature disclosure for publicly traded companies could negatively impact stock prices, investor confidence, and shareholder value. Additionally, a harsh regulatory environment might deter international investors and talent.

Competitive Disadvantage:

Revealing investigation details, including company names, could damage business relationships, partnerships, and market standing. Suppliers may hesitate to engage with firms under investigation, especially if there is significant media attention. It could also lead to increased customer and supplier queries, requiring firms to allocate additional resources to explain that no final conclusion has been reached.

Miscommunication:

If there is mixed messaging around an investigation this could be both overwhelming and misleading for consumers and would be contrary to FCA PRIN 7: *'A firm must pay due regard to the information needs of its clients, and communicate information to them in a way which is clear, fair and not misleading'*.

Legal Liabilities:

Prematurely disclosing the names of subjects or companies can lead to significant consequences, including increased legal liabilities from defamation claims. Such actions can harm the reputation of the firm and the broader sector's financial stability. Additionally, premature naming may create a perception of systemic issues or lack of transparency, impacting other companies within the same industry. Customers may switch to competitors, affecting revenue streams, while suppliers and partners may reevaluate their relationships with the affected firm.

Potential impact on the availability and affordability of insurance:

It is our belief that the FCA's proposals would impact upon the value of FCA regulated businesses if they were subjected to a publicised enforcement investigation. This could have long term implications for the reputation of businesses and would impact shareholders, which could lead to securities litigation that is often extremely expensive for firms. An environment such as this would have implications for the claims experience of D&O carriers who insure FCA regulated entities for such exposures and there is a strong likelihood it would impact upon the affordability of D&O insurance cover for all FCA regulated firms.

Good faith reporting and the risk of retracted engagement:

Many firms self-report in good faith to promptly rectify issues by working with the regulator. Publicly disclosure of investigations may discourage voluntary engagement, hindering the FCA's ability to gather critical information and address misconduct effectively. We disagree with the proposal to make public the details of firms and individuals under investigations. If the FCA were to publish firm names, it would not require much effort to identify individuals that are being investigated. Where such investigations result in no further action, the proposed update to confirm no action was taken would not sufficiently counter the negative and potentially permanent impact to a firm or individuals' reputation. According to a recent Financial Times article[1], 65% of FCA investigations end in no further action. There is no evidence of the FCA having carried out any formal assessment of the potential impacts on reputation or market integrity. For example, IOSCO's 2015 publication on credible deterrence[2] focuses on transparency of final decisions being an effective form of deterrence, not transparency around investigations. Whilst we note IOSCO's documents relate to securities, we believe the finding to be of relevance to the current proposals and applicable cross-sector.

Effective enforcement

In the FCA Annual Report and Accounts 2022/23[3], it is noted that, the FCA cancelled the authorisation of 627 firms that failed to meet the minimum standards - an increase of 30% compared to 2021. The FCA and Practitioner Panel survey shows that in 2021, 55% of firms were aware of the FCA withdrawing permissions from firms or individuals. This increased to 71% in the recent 2022/23 survey. In 2022, the FCA took own-initiative action against 19 firms compared to 25 firms in 2021, a reduction of 33% compared to 2021. This reflects the FCA being more assertive with firms earlier to stop harm. Consequently, the FCA have *"seen an increase in cases where firms either comply or rectify issues voluntarily, reducing the need for the regulator to use their own-initiative powers."*

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[1] Financial Times Article: FCA plans to name firms under investigation in UK deterrence drive
[2] FR09/2015 Credible Deterrence In The Enforcement Of Securities Regulation (iosco.org)
[3] FCA Annual Report and Accounts 2022/23

All these observations demonstrate that the FCA has achieved immense success in taking enforcement action and preventing consumer harm while retaining the trust of consumers and industry alike and without publicising identifiable details of those under investigation. Based on the data published in the FCA Operating Service Metrics for 2022/23[4], the duration of enforcement cases and the length of time taken to close a case at investigation stage has increased year on year, with an increase of 64% since 2021 with investigations taking an average of 41 months to close in 2022/23 compared to 25 months in 2020/21. In the FCA's response[5] to the HoL FSRC it is noted that 67% of cases for 2023 to 2024 resulted in no case to answer. The average time for the FCA to close an investigation was 43 months.

The proposals put forward appear to be regressive and could result in firms being less forthcoming and consumers being misled to believe that the state of affairs within the industry are worse than is truly the case. We would be keen to engage with the FCA to understand the rationale behind the FCA's proposal which seems to be contradictory to the observations above.

Our members support the FCA's intention to deliver useful and educational deterrence that could help firms identify any detrimental conduct (as evidenced in the FCA annual report referenced above) and believe this should not be achieved at the expense of a firm or individuals' reputation before the conclusion of an investigation. An alternative suggestion would be for the FCA to provide anonymous information regarding an investigation. For example, this could include general information related to the firm, the harm the FCA is investigating, the actions that led to the investigation and reiteration of the FCA's expectation.

Public Interest Framework

We do not agree with the structure and content of the FCA's proposed new public interest framework as described in paragraphs 3.5 to 3.12 of CP24/2. the use of a non-exhaustive list of factors that the FCA would use to determine the public interest framework suggests that it would be open to amendment and regulatory discretion which creates ambiguity and reduces firm confidence in their ability to navigate the expectations of the FCA. The proposals in their current form would create issues of trust for consumers and member firms alike.

The FCA would consider in determining that an announcement would be in the public interest and specifically, the likelihood that it would help the investigation, for example, by encouraging potential witnesses or whistleblowers to come forward. The inclusion of whistleblowers here may be misplaced. The rules on whistleblowing were introduced in October 2015 and are well established and clear. Not all cases of whistleblowing are reported in

[4] FCA operating service metrics 2022/23
[5] Response from FCA to HoL FSRC

good faith, relying solely on data-driven factors for announcements could be misleading.

The FCA states that announcements may not be in the public interest if they impact the stability of the UK financial system or the FCA's functions. Our members believe that publishing ongoing investigations would erode trust in financial services, as customers might see this as evidence of wrongdoing rather than routine procedure.

Approach to announcements and updates where the subject is an individual

Our members are concerned that the proposed approach could be contrary to the requirements of GDPR and the ECHR for reasons already addressed above. Whilst publishing names of individuals could encourage witness participation, it is disproportionate to the harm that is being remedied. There is thus far no indication or evidence that demonstrates that sufficient witnesses do not already come forward.

The proposed content of FCA announcements and the risk of trial by media.

We oppose publishing the identity of investigation subjects due to potential dangers and unfair consequences. This could lead to trial by internet/social media, where the public might dox individuals by sharing private information. Publishing such details before an investigation concludes could also introduce biases and prejudice, affecting the investigation's outcome. The FCA proposal to publish a statement on its website to clarify no conclusion has been reached does not sufficiently mitigate the harms described above and is not an acceptable solution.

Our members would be amenable to the publication of the industry sector, regulatory or legal provisions the investigation relates to, and summaries of the suspected breach, failing or other misconduct being investigated, provided that the publication of such data does not lead to the identification of the firm involved.

Proposed methods of publicising an announcement

We disagree with the FCA's proposal to give one business day's notice before announcing an investigation. This period is too short and impractical, as firms need time to notify relevant parties. A one-day notice could breach overseas regulations and imposes tight time constraints, especially for international companies with managers in different time zones. We strongly oppose the proposal not to issue notice at all and further clarity is sought on what may give rise to such an occasion,

Proposal to publicise investigation updates, outcomes and closures

We oppose publishing outcomes and corrections as the announcement itself would cause damage. Even if the FCA amends or removes their publication, negative news is more likely to dominate headlines. This proposal is akin to the often-overlooked small print in contracts.

We strongly oppose retrospective changes as they undermine legal certainty and penalise firms for behaviour that was compliant at the time. This erodes trust in the regulatory framework, deters innovation and investment, and ultimately hinders economic growth.

Removal of private warnings

We oppose removing private warnings as they can be appropriate in certain situations. For example, if a firm identifies and resolves an issue, then self-reports it, private warnings encourage transparency. They are a proportionate response for minor incidents and provide useful data insights, demonstrating the FCA's commitment to being a data-led regulator.

FCA proposed approach to future consultations

We express concern that the FCA, as indicated in paragraph 4.27 of FCA CP24/2, [6] may cease consulting in all instances regarding changes to Enforcement Guidance. Instead, changes would be unilaterally published on the FCA website. The Financial Services and Markets Act (FSMA) outlines the FCA's general duty to consult.[7] Consultations serve as a vital feedback mechanism from industry stakeholders, shaping proposed changes. Industry experts and firms contribute valuable insights, identifying potential unintended consequences and regulatory overreach. Website updates contradict our values of transparency and open dialogue. They risk missed updates and inadvertent rule breaches.

The current proposal emphasises deterrence, we advocate for an educational approach that benefits both consumers and firms Whilst raising awareness is crucial, repeated public naming and shaming of firms could lead to overexposure, blurring the distinction between less severe and more serious investigations. Moreover, fostering a culture of fear may lead to a decline in prospective talent entering the industry - counter to the FCA's commitment to promoting DEI. Individuals might hesitate to join an industry where they risk being publicly identified and criticised for an unintentional error. The FCA's roadshows, webinars, roundtables, and open dialogue have been positively received by the industry, and we hope they will persist.

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[6] FCA CP 24/2 Our Enforcement Guide and publicising enforcement investigations–a new approach
[7] s.1M FSMA

We hope our comments are useful to the House of Lords and would be pleased to expand or clarify on any of the points made.

11 October 2024