

Futures Industry Association (FIA) – Written evidence (EGC0023)

The Futures Industry Association (FIA)¹ and The European Principal Traders Association (FIA EPTA)² welcomes the opportunity to respond to the Financial Services Regulation Committee's Call for Evidence seeking feedback and views on the proposals set out within the FCA's consultation paper CP24/2: *Our Enforcement Guide and publicising enforcement investigations—a new approach*.

Our response focuses primarily the FCA's proposed changes to investigations, including proposals to publicly announce the opening of enforcement investigations, disclosing the identity of the subject of the investigation, and publishing updates throughout the investigation process, where the FCA considers this to be in the public interest.

FIA and FIA EPTA ('The Associations') members support the FCA's objectives set out in the [FCA 3-year strategy 2022-2025](#) which aim to (i) reduce and prevent serious harm, (ii) protect the integrity of the UK financial system, and (iii) promote competition in the interest of consumers. Furthermore, the Associations welcome the FCA's efforts to identify opportunities to adapt the UK regulatory system to further strengthen the attractiveness of UK capital markets. Due to the complex nature of UK financial markets and its diverse range of stakeholders, it is essential that regulation and regulatory oversight are proportionate and fit for purpose in order to facilitate orderly market conditions.

The Associations' members are concerned that the FCA's proposals set out in CP24/2 will be detrimental to the orderly functioning of UK capital markets and provide limited value to the public interest. As such, we have strongly recommended that the FCA reconsiders its proposed approach and contemplate alternative methods already available to the FCA to improve transparency and achieve its desired outcome. We are confident that the FCA's objectives can be achieved through existing means which allow for FCA to publish timely information about investigations in a robust and effective way in order to raise

¹ FIA is the leading global trade organization for the futures, options and centrally cleared derivatives markets, with offices in Brussels, London, Singapore and Washington, DC. Our membership includes clearing firms, exchanges, clearinghouses, trading firms and commodities specialists from about 50 countries as well as technology vendors, law firms and other professional service providers.

² FIA EPTA represents 24 independent European Principal Trading Firms (PTFs) which deal on own account, using their own money for their own risk, to provide liquidity and immediate risk transfer in exchangetraded and centrally-cleared markets for a wide range of financial instruments, including shares, options, futures, bonds and ETFs. FIA EPTA's members are based in the Czech Republic, Germany, Ireland, The Netherlands, and the UK (~70% of our members have been licensed by the FCA).

consumer awareness, protect consumers, maintain market confidence, educate the market and deter misconduct.

The Associations welcome the FCA's commitment to making its activities transparent. Being open and accountable sets a commendable 'tone from the top' and will allow the FCA to educate and inform the market while remaining open to scrutiny by consumers, firms and Parliament.

This commitment on the part of the FCA is already achieved in a number of ways, including through publication of newsletters (for example, FCA Market Watch), Policy and Guidance documentation, final reports on Multi-firms Reviews, Thematic Reviews and through facilitating industry roundtables.

Our members are concerned by the FCA's proposals set out in CP24/2 and its potential detrimental impact on UK capital markets and its participants. These concerns are summarised below.

Announcing investigations, including the names of the subject(s), when in the public interest

6.1.3 of the existing FCA Enforcement Guide states that where the FCA is investigating a matter, FCA will, *in exceptional circumstances*, make a public announcement that it is doing so if the FCA considers such an announcement is desirable to:

- (1) maintain public confidence in the *financial system* or the market; or
- (2) protect *consumers* or investors; or
- (3) prevent widespread malpractice; or
- (4) help the investigation itself, for example by bringing forward witnesses; or
- (5) maintain the smooth operation of the market.

In deciding whether to make an announcement, the FCA will consider the potential prejudice that it believes may be caused to any persons who are, or who are likely to be, a subject of the investigation.

As outlined above, the FCA has existing powers to make public announcements relating to investigations. Furthermore, the FCA acknowledges the prejudice and impact caused by such announcements. As such, the Associations' members challenge the need for the new approach as detailed in CP24/2.

As stated in 6.1.4 of the Enforcement Guide, the FCA believes that exceptional circumstances may arise where matters under investigation have become the

subject of public concern, speculation or rumour. In this scenario, and those referred to in paragraph 6.1.3, our members agree that it may be desirable for the FCA to make public certain facts in order to allay concern, contain speculation and rumour, while also maintaining confidence in the financial system and protect consumers.

Balancing the desire for transparency with the smooth running of financial markets should be of the utmost importance.

A previous [case](#) relating to the FCA's disclosure of information relating to UK insurance markets in 2014 provides a real-life example of the undesirable consequences caused by information entering the public domain, where speculation and market disorder escalate beyond the control of the regulator and/or impacted entities. The Associations' members encourage the FCA to take note of the past when considering its future approach and ensure its approach is fit for purpose within UK financial markets. Another example from May 2017 should act as a warning whereby the Serious Fraud Office publicly announced that it was investigating Petrofac regarding suspicions of bribery, corruption and money laundering. As a result of the public announcement, shares in the oil services firm fell by 14%.

We recommend that the FCA exercise caution when drawing comparisons with other global regulatory authorities as set out in 2.18 of CP24/2 given that different market conditions, market expectations, legal systems and counterparty rights will apply in these jurisdictions. When considering the proposals in comparison to the approach of other global regulatory bodies, our analysis suggests that the proposal would make the FCA somewhat of an anomaly given that the majority of global regulators do not routinely make public announcements relating to investigations. Within CP24/2, the FCA makes specific reference to the Monetary Authority of Singapore ("MAS"). Our analysis indicates that MAS has only announced two open investigations out of approximately 104 listed formal regulatory and enforcement actions in the last five years and these two investigations relate to joint investigations between MAS and the Singapore Police Force. As such, we argue that MAS' approach is aligned to the FCA's existing approach to disclosure whereby public disclosure is made in "exceptional circumstances", an approach which we consider should be continued.

When considering the approach taken by other regulatory authorities, the FCA should note the Prudential Regulation Authority's (PRA) policy on publication. When determining whether to make a public announcement, the PRA will also consider **any potential prejudice risk of unfairness and/or disproportionate damage** that it believes may be caused to any persons who are, or who are likely to be, a subject of the investigation and/or to third parties (see [9.7: 1 'The PRA's general approach'. 2 Annex 1 to 'The Bank of England's approach to enforcement: statements of policy and procedure'. 92 Bank of England | Prudential Regulation Authority](#)).

Similarly, the FCA may wish to consult chapter 10 of the Office of Financial Sanctions Implementation (OFSI) enforcement and monetary penalties for breaches of financial sanctions [Guidance document](#) which states that public disclosure may be published where “Treasury is satisfied, on the balance of probabilities, that a person has breached a prohibition, or failed to comply with an obligation, that is imposed by or under financial sanctions legislation”. These powers may be used as a form of enforcement and deterrence “where there are valuable lessons to be learnt for industry” (para 10.2 OFSI guidance). It should be noted, however, that prior to making a public disclosure, OFSI will consider whether disclosure is fair and proportionate (para 10.2 OFSI guidance) and, if disclosure is deemed appropriate, OFSI will give 28 working days’ notice in order to allow for the entity to make representations. Following representations and the expiration of the 28-day notice, which can be extended, should OFSI wish to make a public announcement, they will share the written case summary with the firm to ensure factual accuracy. OFSI sets a high bar to be satisfied before a disclosure will be made and the power will be used in genuinely exceptional cases (para 10.4 OFSI guidance). In addition, OFSI is clear that where “a disclosure is made solely for the purpose of highlighting compliance lessons for industry and the breach is considered to be of lesser severity, OFSI will not usually identify who performed the breach.” (para 10.10 OFSI Guidance).

The FCA should take note of the statutory framework set out within the Financial Services and Markets Act (FSMA) and consider the impact of the proposals set out in CP24/2 with respect to the publication of notices provisions set out in Section 391 and the related Sections of FSMA. Public announcements, as proposed within the consultation paper, undermines the statutory framework set out in FSMA.

The potential impact on UK markets and its participants

The outcome of a regulatory enforcement case can be multifaceted. In many cases, the reputational impact on a firm outweighs the financial impact of a fine. The Associations’ members are concerned that the FCA’s proposal to publicly announce the opening of an enforcement investigation and the identity of the subject of the investigation will result in the reputational damage against the subject, as well as frontrunning the investigation process and its findings. Sometimes, e.g. if the FCA has found evidence that a firm is operating a suspected Ponzi scheme, it might be considered by the FCA desirable to announce the investigation, to further consumer or investor protection. However, the FCA already has powers to do this. Our members share the view that negative reputational impact, at the outset of an investigation, is predominantly likely to be unjustified given the infancy of the investigation, its limited details and lack of findings at the time of an announcement being published.

The negative reputational impact will go beyond the subject of an investigation and may also have a negative impact on individuals. As a direct consequence of an announcement, the senior managers at a firm, who are publicly identified on the FCA's website, may suffer individual reputational damage with limited ability to defend themselves. For example, the SMF16 and 17 may suffer immediate damage with little or no opportunity to publicly defend themselves in the event that a firm has an investigation announced in relation to their market abuse or anti-money laundering controls, respectively.

These impacts should not occur at the outset of an investigation and are further exacerbated given that the average duration of an investigation is currently 41 months and approximately 65% of investigations close with no further action.

Publicly identifying the subject of an investigation may also have undesired impacts on the financial market. The lack of concrete findings and evidence upon opening an investigation will mean that an announcement from the FCA is likely to increase speculation in the market, creating disorder for the entity and potentially other firms in the sector.

An announcement by the FCA may be the catalyst for clients moving trading accounts away and/or diverting investment from a firm. Credit lines and funding may also be switched off as the market makes risk-based decisions and the entity quoted with the announcement seeks to address client and counterparty queries on the severity and nature of the investigation.

Similarly, firms may be subject to contractual arrangements that treat the commencement of an investigation as an event of default or, at the very least, a disclosure event, to the extent that the investigation is considered 'public'. We are concerned that a public announcement upon commencing an investigation against an entity may create early trigger points within contractual provisions which are undesirable from a systemic perspective and could result in a 'run' on the firm concerned. It is our shared belief that the impact and potential consequences come too early in the investigation process and encourage FCA to work on balancing its desire for transparency alongside ensuring the fair and orderly functioning of markets.

Finally, the FCA's proposals may impact beyond UK financial markets. This is especially significant in the scenario where the FCA publicly identifies a branch or affiliate, located in the UK and regulated by the FCA, headquartered in another jurisdiction. Heightened scrutiny and speculation caused by identifying a firm upon opening an investigation may result in questions being raised to the FCA by non-UK regulatory authorities seeking to gain information relating to the investigation in order to assess whether similar deficiencies exist in their home markets. Furthermore, publicly identifying an entity upon opening an investigation may hinder an existing investigation in another jurisdiction where

enforcement cases are bound by professional secrecy and presumption of innocence obligations until the investigation process is concluded. Given limited details upon opening an investigation, we are concerned that early identification of entities subject to an investigation may create unnecessary regulatory scrutiny of unassociated activities.

A cumulation of unintentional consequences for market participants, alongside the implications on the fair and orderly running of UK markets, may impact the UK's competitiveness in global markets and its long-term attractiveness to investors and consumers.

Alternative solutions to achieving FCA objectives

The Associations welcome FCA's commitment to being transparent in its regulatory functions, and we are confident that this objective can be achieved through alternative methods, some of which are already available to the FCA.

FCA's Market Watch acts as a periodical newsletter where firms gain insight into FCA focus areas relating to market conduct and transaction reporting issues. Enhancing the frequency and content of Market Watch publications will improve transparency, allowing firms to benchmark their internal process and controls against FCA's expectations.

We encourage the FCA to publish the findings and conclusions of Peer Reviews, Multi-firm Reviews and Thematic Reviews in a timely manner. This serves as an educational resource and provide all stakeholders, including consumers, market participants and Parliament with insight into the work of the FCA. Finally, the use of FCA Dear CEO letters is a valuable source of information which allows the regulator to share details relating to market practices and highlight the FCA's expectations and concerns on a specific topic or sector. Appropriate, and potentially enhanced, use of these communication methods provides guidance and recommendations for firms to improve their compliance and overall performance to reduce and prevent serious harm while protecting the integrity of the UK financial system, two pillars of the FCA's 3-year strategy 2022-2025.

The Associations thanks the Committee for the opportunity to provide input. Should you have any questions, the Associations stand ready to engage further with the Committee.

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