Clifford Chance – Written evidence (EGC0040)

1. Clifford Chance LLP ("**Clifford Chance**") is a global law firm headquartered in London. We have extensive experience representing firms and individuals who are the subject of FCA enforcement investigations and answer this call for evidence based on that experience. The views expressed in this response are the firm's and are not made on behalf of any specific clients. But having discussed these issues extensively with our clients, we consider our concerns as summarised in the letter reflect concerns held by the vast majority of our affected clients.

2. Since the original publication of the CP, the FCA has engaged extensively with the industry and we have participated in that engagement, sharing these views directly with the FCA and our clients. We also understand the FCA intends to consult further in relation to the proposals later this year, and we welcome that engagement and will participate in it. In particular, we understand the FCA intends to publish "*greater definition of the public interest test*", including "*case studies examining how the criteria might apply and what announcements could look like, as well as more information on the numbers of cases that might be affected*". We welcome that the FCA has engaged and is responding to that engagement. We will consider any further material published by the FCA carefully, including whether it adequately addresses our concerns set out below.

Press releases naming firms under investigation will act as a form of unfair public criticism, without due process.

3. The FCA's proposal to name firms alongside a summary of the suspected breach, failing or other misconduct being investigated is inevitably a form of public criticism, even if (as proposed) the FCA also states that it has not completed its investigation nor formed any final views. Making such public criticism prior to an investigation having been undertaken (and without following the procedural safeguards built into FSMA that Parliament intended should apply before such criticism is made) cannot be fair or consistent with the principles of natural justice. This is particularly so in circumstances that the evidential threshold for opening an enforcement investigation is low and approximately sixty five percent of investigations are eventually closed without any action being taken.

4. Named firms may immediately suffer general reputational harm, potential withdrawal of business by customers, clients, counterparties; suspension of new business opportunities; unmeritorious litigation;

and incorrect and damaging press speculation. Smaller firms could fail as a result.

5. Individuals even if not themselves named or under investigation, may also immediately suffer harm. Senior Managers will in many cases be able to be readily connected with the matters under investigation by virtue of holding a relevant Senior Management Function (information that is publicly available through a search of the FCA Register). The announcement into their firm and/or business area could be enough to generate press speculation about their status in the investigation, difficulty continuing in their role, and difficulty finding another role, in whatever sector.

6. The FCA states that there is no provision in FSMA which prevents it from making the proposed announcements. However, in our view sections 207 and 208 of FSMA require that the FCA follow due process before publishing a statement which amounts to a public censure of a firm. The FCA's predecessor, the FSA, appears to have also held this view and described these provisions in DP 08/03 as "*significant procedural safeguards…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....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*".[1]

7. The CP indicates that the FCA has concluded that its proposals do not engage FSMA's protections for public censure[2] but provides no explanation as to why. There is no obvious difference between a press update late in the investigation process stating (or implying) that the FCA continues to consider there are circumstances suggesting a breach, and, alternatively, a Warning Notice statement shortly thereafter indicating that the FCA believes the firm has committed breaches, but emphasising (as all Warning Notice statements do) that "*a Warning Notice is not the final decision of the FCA*". However, the procedural safeguards that exist for firms in the context of a Warning Notice statement (discussed below) will not be in place for earlier publicity under the FCA's proposals.

Naming firms under investigation will harm the competitiveness and reputation of the UK financial services market and is therefore inconsistent with the FCA's secondary international growth and competitiveness objective.

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1 DP 08/03, paragraphs 4.14 and 4.15.

2 CP, paragraph 2.16.

8. In our view, early-stage press releases naming firms will harm the international competitiveness of the financial services sector. Diminishing the FCA's international reputation for rigour and fairness undermines UK competitiveness more generally.

   (a) As indicated above, the proposed approach will cause unjustified reputational and economic harm to many financial services firms and individuals who have not broken any rules. The harm caused to those firms will directly undermine growth.

   (b) Further, the proposals will discourage firms from establishing in the UK, who may be discouraged from doing so where enforcement authorities in other major financial centres in Europe, the US and Asia take a different, fairer approach.

Naming firms under investigation would make the FCA an international outlier and diminish the FCA's international reputation.

9. The FCA's proposal is inconsistent with the approach adopted by most comparable regulators with broadly similar objectives in other major jurisdictions and would make the FCA an international outlier. The examples the FCA cites of other regulators who take a similar approach, CMA and Ofgem in the UK and MAS in Singapore, are the exceptions rather than the rule, and distinguishable.

10. The SEC, for example, does not issue early-stage press releases naming firms to achieve deterrence or to identify relevant witnesses. It achieves these objectives through fast-paced investigations using the full range of investigative tools, with timely public outcomes. It will undermine the FCA's reputation internationally to be an outlier in the approach to publicity, which will be seen as the FCA lowering its standards of investigative rigour and fairness compared to its peers.

The public interest framework as proposed in the CP fails to take account of the impact on firms of publications.

11. The proposed new public interest framework as set out in the CP states that all relevant facts and circumstances will be considered in the public interest test. However, the potential impact of publication on firms would not be considered as a standalone factor because the FCA considers that assessing whether to name a firm under investigation should be "primarily focused on promoting our statutory objectives". Since publishing the CP, the FCA acknowledged concerns on this point and stated that the FCA will take "*a case-by-case approach following assessment of clearly defined criteria - including consideration of the potential impact on the firm and market*".[3] It

[3] https://www.fca.org.uk/news/speeches/change-better-evolving-approach-

remains to be seen whether the FCA includes the impact on the firm as a standalone element of the public interest test or addresses our fundamental concerns with their approach.

12. Ultimately, promoting its statutory objectives requires the FCA to take proper account of the potential impact on firms. The FSA acknowledged in DP08/03 that, in enacting FSMA, Parliament was focused on balancing enforcement rights with the rights of the regulated. Ensuring that relevant markets function well (the FCA's strategic objective) depends in part on the regulator treating regulated firms fairly, which must require the regulator to consider the potential impact on a firm of disclosing that it is under investigation and include a fair process for representations. Such a process is unnecessarily unfair when the outcome of its decision will amount to public criticism and lasting reputational harm to the named subject. We acknowledge that the FCA has subsequently acknowledged that it will need to give firms more than one business day's notice of its intention to disclose that the firm is under investigation and will need to provide firms an opportunity or mechanism for a firm to make representations. While modification on their proposed procedure in this regard will be welcome, we do not expect this alone will be sufficient to prevent unwarranted harm to firms in some cases.[4]

13. The FCA's predecessor, the FSA, also emphasised in DP 08/03 that, in the exceptional circumstances of publication of an enforcement investigation, the regulator should consider the impact on a firm, with "*several significant issues and competing priorities regarding the use of publicity in the enforcement context, particularly where…there has been no determination of culpability*" including *"concerns about the fairness of publicity by us – and, potentially, consequential media attention – potentially prejudicing those who are the subject of an investigation where the case is ongoing*".[5]

14. If these proposals are implemented, the FCA should, at a minimum, follow a similar approach to that which it takes in respect of Warning Notice statements under section 391 FSMA, where the FCA is required to consult with the subject of the statement and to give them the opportunity for representations, which it must consider. The cases are equivalent, where the FCA is making a public statement identifying a firm under investigation and indicating that, in the FCA's view, the firm may have breached regulations or laws

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enforcement

4 https://www.fca.org.uk/news/speeches/change-better-evolving-approach-enforcement, "*allowing firms time to provide their views on whether, what and when we announce, will be part of any proposal we take forward*".

5 DP 08/03, paragraph 6.5.

(albeit that no final decision has been made). The fact that a Warning Notice is being made at the end of an investigation, on which the FCA places weight, does not alter the reputational and commercial impact of a press release and the justification for a fair opportunity to make representations is even stronger at the outset.

15. The FCA's discretion under the public interest test is also too broad. The FCA has stated publicly that there will be no presumption in favour of publication, and its assessment of the public interest will be on a case-by-case basis. However, the breadth of the proposed public interest test, including whether an announcement would provide "reassurance" that the FCA is taking action, arguably gives the FCA scope to justify publication in most cases.

The FCA's proposed procedural safeguards are insufficient to prevent lasting harm.

16. The FCA's proposal to include a caveat that a public statement does not imply the FCA has reached any conclusions is not sufficient to avoid a public perception that an announcement by the FCA of an investigation is a public criticism. This will cause lasting reputational harm. The FCA's proposal to also publicly state that the FCA has not reached any conclusions, will not prevent the harm caused by such public criticism.

17. Similarly, subsequent notification of the closure of an investigation is unlikely to undo the reputational harm its earlier announcements have caused. Typically, FCA closure notices do not provide positive confirmation that the relevant potential breaches have not been committed. Rather they tend to state simply that the investigation has been closed which will inevitably leave a lingering shadow over the reputation of those involved.

18. Further, the FCA has not clearly identified how it will ensure the public perception of the seriousness of a matter being investigated matches the findings ultimate reached. This a real likelihood in some cases given the low threshold for an investigation to be opened. For example, concerns might initially be raised about insider dealing, but ultimately fall away and be replaced with less serious systems and controls failings. This potential imbalance between the impact of what is said at the beginning and end of an investigation will be of significant concern to firms who may be left with an unwarranted stain on their reputation caused by the original (and ultimately unfounded) announcement.

FCA's stated objectives can be achieved through existing means.

19. The FCA's stated aims are to be more transparent about enforcement to reassure the public, ensure faster dissemination of best practices

and concerns, increase deterrence and drive positive behavioural change, as well as encouraging witnesses and whistleblowers to come forward. However, there is no need to name enforcement investigation subjects to achieve these objectives.

20. Reassurance, education, deterrence and driving positive change can all be achieved through publishing anonymised information about investigations. This can range from anonymised press releases relating to individual cases to periodic publications covering current themes across investigations (similar to the FCA's existing "Market Watch" which deals with issues in the relation to wholesale market conduct).

21. Existing anonymised publications such as Market Watch generate widespread and detailed discussion amongst firms and other commentators. They may not generate sensational headlines in the mainstream press, but headlines do not deliver proper reassurance, education or deterrence, which come from measured and informed discussion. Publishing anonymous information will also likely allow the FCA to say more about what it is investigating and what it expects of firms and communicate clearer and more detailed "lessons learned" information about what firms need to do to improve their systems and controls.

22. In addition, the FCA's existing statutory tools that enable it to identify and obtain information from relevant witnesses and protect whistleblowers are already working well. There may continue to be rare exceptions in which the FCA's objectives require naming a firm under investigation, which the existing rules provide for. There is no need for change.

Naming firms under investigation will dilute the impact of regulatory enforcement action, if and when it is taken.

23. The CP emphasises the fundamental importance of enforcement as a deterrent. We do not consider that using press releases as a means of "bringing forward" deterrence is the right solution to this problem. The deterrent effect of a press release merely announcing an investigation will be very limited, in circumstances that such an announcement will not be able to contain the key features of enforcement that create deterrence (such as detailed findings, criticisms or penalties). By attracting public and press attention to a matter at the start of an investigation, the FCA might in fact reduce the attention paid to the ultimate regulatory outcome (because the FCA's action will be "old news") thereby weakening deterrence when it could otherwise have a greater impact.

The FCA's proposals do not appropriately safeguard individuals.

24. Whilst the FCA states in the CP that it will "*will not usually announce*" an investigation into an individual, the proposed approach enables an investigation into an individual to be announced publicly in some cases, if doing so can be achieved without a breach of the law. Many of our objections to the FCA's proposal to name investigations into firms outlined in our response above also apply to the FCA's proposal in respect of individuals. Even if such announcements could be made without a breach of the law, we disagree that they should be. As noted above, there are other means of supporting the FCA's stated objectives. It is therefore difficult to see how publication of an individual's name would ever be necessary.

11 October 2024