Linklaters – Written evidence (EGC0042)

We have significant concerns regarding the FCA's proposals in relation to the public disclosure of the commencement of individual investigations, including naming the subject(s) of these investigations. We have specific concerns about the legal basis of the FCA's proposals, the FCA's proposed test for assessing whether disclosure is appropriate, the practical operation of the transparency process and the FCA's proposal to give only 24 hours' notice of an announcement.

Legal basis

1.1 The FCA has not set out the legal basis upon which it is empowered to publicise the details of new and ongoing investigations (including the subject of those investigations), nor has it acknowledged how it is comfortable that the content of its announcements will be compatible with its statutory confidentiality obligations.

1.2 The Financial Services and Markets Act 2000 (FSMA) sets out the legislative framework for publicity in relation to the FCA's enforcement activity. Unlike the CMA (which has specific powers in section 25A of the Competition Act 1998), FSMA does not authorise the FCA to either announce the start of an investigation or disclose the identity of the subject of that investigation. Parliament has previously stated that the wide-ranging powers of the financial services regulator should be closely defined by Parliament.[1]

1.3 Further, section 348 FSMA prevents the FCA from making public "confidential information" received by the FCA for the purposes of or in discharge of its statutory functions. The FCA has historically cited this as the reason why it cannot comment on active or new investigations. It has also cited section 348 as the basis for declining requests from the Treasury Select Committee for details of its ongoing supervisory work.[2] The FCA has access to several statutory

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[1] On 28 June 1999, for example, the MP David Heathcoat-Armory said the following:

"*The FSA is a private company. It enjoys substantial statutory immunity and has wide powers of investigation. It is also able to deprive people of their livelihood, to levy unlimited fines and to keep that fine income. Very few other bodies enjoy that amount of power and authority. It is therefore very important that those powers, which in many respects are necessary, should be circumscribed and closely defined by Parliament, and that the FSA should be accountable for the use of those powers*."

[2] E.g. June 2014: Response to TSC re request for certain legal opinions and agreements between the FCA and banks relating to the FCA's review of interest rate hedging products (IHRPs); February 2018: Response to TSC re publication of s. 166 report into RBS treatment of small and medium-sized enterprise customers; October 2017: FOI

gateways for disclosing confidential information (set out in the Financial Services and Markets Act 2000 (Disclosure of Confidential Information) Regulations 2001 (the "**Disclosure Regulations**")). The "self-help" gateway (set out in regulation 3 of the Disclosure Regulations) enables the FCA to disclose information where necessary in the discharge of its public functions, but the FCA has itself said that, just because a disclosure is relevant to its functions won't necessarily mean that it meets the threshold for relying on the 'self -help' gateway.[3]

1.4 Given these issues, the FCA needs to do far more now to explain the legal basis for disclosure, including why disclosure will support the discharge of the FCA's public functions (rather than simply saying as set out in CP24/2 that disclosure will support the FCA's statutory objectives).

Concerns with the framework for assessing whether disclosure is appropriate.

1.5 We agree that, in principle, greater publicity about the FCA's investigations and enforcement work at an earlier stage could support trust and confidence in the system, and could (depending on the nature and content of the disclosures) deliver educational benefits for firms and the market by highlighting areas for possible attention at an earlier stage. However, we do not agree that disclosure is necessary or helpful to supporting the FCA's own accountability for the efficiency and pace of its investigations. The FCA's existing internal governance and oversight mechanisms should be sufficient to ensure the timely and accountable progression of investigations.

1.6 More significantly, the FCA's proposed public interest disclosure framework is very vague. CP24/2 contains no practical guidance on how the framework would be applied in practice. It is essential for the FCA to explain in more detail how it would apply the framework in practice, including examples of when disclosure would or would not be appropriate. We also consider it is not appropriate for the

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request on RBS s. 155 report referred to above (see p. 6 onwards on application of s. 348); June 2019: FOIA Decision Notice re ARROW programme.

[3] DP08/3: "the mere fact that a disclosure is relevant to or in line with our functions will not, of itself, be sufficient to satisfy the ["self-help" gateway]…The disclosure must be able to be reasonably presumed to make a material contribution to the discharge of that [public] function".

disclosure framework to ignore the impact of publication on the investigation subject. As we explain below, any public announcement of the start of an investigation could have a material impact on the investigation subject. A failure to consider this as part of the test for assessing whether disclosure would not be compatible with FCA's duties as a public authority to exercise its powers fairly and appropriately, considering all relevant factors.[4]

Failure to evaluate the potential adverse consequences of early publication.

1.7 The FCA's consultation underestimates the significant potential adverse consequences of publicising the subject of an FCA investigation. We have some key adverse impacts briefly below:

1.8 Impact on the investigation: There is a significant risk that early publicity could negatively influence the conduct of an investigation, by leading to the FCA feeling pressured to substantiate its case in circumstances where an investigation has already been publicly announced.

1.9 Risk of public confusion: The public (and press) is unlikely to appreciate the distinction between a suspicion that requires an open-minded investigation and a conclusion that a breach must have occurred – and may see any announcement of an investigation as indicating the latter, irrespective of any disclaimers / generic language included by the FCA when announcing an investigation. Announcements of the closure of an investigation may also not fully clear a firm's name (e.g. simply referring to an absence of sufficient evidence to proceed), potentially leaving a lingering impression of misconduct or non-compliance that was not severe enough for enforcement, rather than an absence of misconduct altogether. The FCA does not appear to have conducted any studies to assess whether the public will grasp the subtleties, and has not explained how it will combat the risk of public misunderstanding and the resulting reputational and financial damage on the firms in question.

[4] We are aware that the FCA has subsequently suggested that the broad reference in the consultation to "*taking all relevant facts and circumstances into account*" means that the impact on the firm will be considered, having first assessed the public interest factors. If this was the intention, it is by no means evident from the consultation paper, not least given the express statement in the consultation that the FCA does not consider the impact on a firm as 'relevant' factor. Greater clarity from the FCA as to its intended approach is therefore required.a

1.10 The risk is heightened in an era of continuous news coverage and the rapid, and often uncritical, spread of information, or misinformation, via social media. Whilst the FCA cannot be held responsible for the media, it has a responsibility as a public body responsible for maintaining market certainty and consumer wellbeing to consider the appropriateness of its policy decisions noting the context, including the media environment, in which they are made.

1.11 Impact on cooperation: Early publicity might discourage cooperative engagement from the subject of the investigation. Firms may perceive there to be less advantage to settling if early publicity about the investigation has already led to reputational harm. They may then have less to lose from a reputational perspective from defending a case all the way to the Upper Tribunal. Firms will also inevitably feel compelled to publish their own statements about the circumstances leading to an investigation. This risks an unsightly 'war of words' in the press that could lead to both parties adopting a more adversarial position from the outset than is generally the case at present. Conflicting statements also increase the risk of consumer confusion.

1.12 Potential for identifying accountable individuals: Despite the FCA's statement in CP24/2 that it would not typically announce the commencement of investigations into individuals, the Senior Managers & Certification Regime and publicly accessible information on the FCA Register will make it easy for the media and public to identify which Senior Manager oversees the business line/function where the suspected misconduct has occurred, leading to a risk of widespread and unhelpful speculation about whether individuals are under investigation. The threat of early publicity in relation to investigations will also not improve how psychologically safe staff at regulated firms feel in bringing mistakes or issues to the attention of the firm or the FCA.

1.13 Business impact: Currently, firms cite the confidentiality of active investigations when responding to due diligence questionnaires (DDQs) or requests for proposals (RFPs) from clients or business partners. If investigations are announced by the FCA, firms may need to provide information and updates about ongoing investigations in response to DDQs / RFPs. This could reduce the

willingness of such clients/business partners to work with firms, even if the investigation ultimately (often many years later) leads to no action being taken.

1.14 Financial harm: Speculation following the public announcement of the commencement of an enforcement investigation could cause significant and unwarranted harm to shareholder value. In some cases, such announcements could threaten the safety and soundness of a firm or create broader financial stability risks, particularly for smaller or medium-sized financial institutions with less capacity to absorb the impact of market shocks.

1.15 The FCA maintains that its review of share price movements following historic RNS announcements of FCA investigations by firms did not demonstrate any fall in market value. It is misleading to draw conclusions about the likely impact of a new policy based on historical data – the number of cases where RNS announcements have been made by a listed firm regarding the commencement of an investigation are a small percentage of the overall portfolio of historic FSA/FCA cases. These may also have been cases whether the matters of concern were already well-known.

1.16 Misunderstandings about previous FCA action have disrupted markets and diminished market value. In 2014, the FCA's announcement of plans to investigate the treatment of closed-book customers led to a sharp decline in the value of insurer shares, which later recovered after the FCA clarified the scope of its review. Similarly, the FCA's announcement of a review of historical motor finance commission arrangements in January 2024 caused a drop in share prices for lenders involved in motor finance, particularly affecting smaller lenders with outsized exposure to motor finance business.

1.17 Legal and litigation concerns: The announcement of a new investigation could precipitate an increase in potentially unwarranted customer complaints and Financial Ombudsman Service (FOS) referrals. It may also prompt third-party legal action, such as requests for pre-action disclosure or potential claims initiated by claimant law firms or enquiries from claims management companies. For firms already defending litigation, it could prompt requests for pre-action disclosure.

1.18 CP24/2 does not articulate how the public interest test would be applied where there are several regulators/prosecutors engaged in investigating the same set of events. It is also inevitable that where firms are responding to the proliferation of disputes early publicity would potentially generate (pre-action, FOS and enforcement), this will result in elongated investigation periods. The impact would be even more acute where smaller/medium sized firms are being investigated.

1.19 Competitiveness of the financial services sector in the UK: The UK's status as a centre for financial services faces constant challenge from other significant global financial hubs. Most national financial services regulators do not name firms currently under investigation. In taking the opposite approach, the FCA would make itself a global outlier, and the FCA's decisions could therefore undermine the FCA's secondary statutory objective to promote the competitiveness and growth of the UK economy. These concerns are e

Inconsistency with FCA's previously stated position

1.20 We note also that the FCA's proposals are inconsistent with its previously stated approach – see for example CP17 (December 1998),[5] and DP08/3 (2008),[6] in which the FSA (as it was) concluded that publication may "prompt unwarranted public concern", "put consumers' funds at risk" or "do unwarranted damage to the reputation of firms, issuers or individuals involved". CP24/2 gives no adequate explanation as to the legal or other basis for the apparent change in its assessment.

The FCA's objectives can be achieved without naming the investigation subject.

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[5] CP17 (December 1998): in anticipation of the coming into force of FSMA: *"We propose that, as a general policy, the FSA will not make public the fact that it is (or is not) investigating a particular matter. Publication of the fact that an investigation has been commenced by the FSA may prompt unwarranted public concern about the matters and persons within the scope of an investigation. It may put consumers' funds at risk or do unwarranted damage to the reputation of firms, issuers or individuals involved".*

[6] Transparency as a Regulatory Tool DP08/3: *"significant procedural safeguards were 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. … There are several significant issues and competing priorities regarding the use of publicity in the enforcement context, particularly where investigations or proceedings are ongoing and there has been no determination of culpability. A balance needs to be struck…"*

1.21 The FCA's stated objectives for introducing the policy proposed in CP24/2 can be met effectively by the FCA offering more frequent updates on its enforcement activities in an aggregated and anonymised manner. The FCA could provide a monthly or quarterly summary detailing the number of investigations initiated or concluded, the types of firms or sectors involved, and the general issues under investigation, without revealing the identities of the subjects. Sharing information on this basis would not only mitigate the potential harms set out above but would also allow the FCA to share more detailed and transparent information with the market without contravening s.348 FSMA.

1.22 While we acknowledge that there may be exceptional situations where non-anonymised disclosure is warranted, these can be managed on an individual basis, and largely within the parameters of the FCA's current policy (which already allows for disclosure in exceptional circumstances).

1.23 We consider that this alternative approach would strike a fairer, and more effective balance of interests, than the FCA's current proposals. Even if the FCA had reservations about whether these changes went far enough, we would suggest that it would be more appropriate to adopt the approach suggested above, and then to undertake a post-implementation review of its effectiveness in achieving the intended objectives, rather than rashly adopting the current proposals, given the considerable concerns summarised above and articulated with force by the financial services industry in response to the FCA's consultation.

Content of proposed public disclosure

1.24 CP24/2 does not provide details of the information that would be disclosed about the nature of the alleged breaches under investigation. Nor does it contain any detail or examples of the circumstances in which the FCA would provide public updates on its investigations and the information these updates would contain. In contrast, in CP13/8 (Enforcement: publishing information about warning notices) the FCA provided worked examples and case studies of what warning notice statements would contain. The FCA has subsequently indicated that it intends to provide examples and additional information about its intended approach. Whilst this will

undoubtedly enable firms to better understand the potential impact of the FCA's proposals, our position remains that the FCA has failed to outline a compelling case for such a fundamental change in approach, when its objectives can be achieved through more proportionate alternatives such as those set out at 1.21 above.

24-hour notice period

1.25 The proposal to only provide a 24-hour notice period to firms before publicising an investigation does not leave firms with sufficient time to engage with the FCA (regarding the timing and content of any announcement) or to prepare internally. Regardless of whether the possibility of early publicity has been discussed with the FCA in advance, all firms would need to undertake several steps upon receipt of the actual draft announcement text. These include (but not limited to) briefing internal stakeholders; consult with comms and PR teams, legal and other advisors; craft internal messaging; draft media statements and client comms, brief and resource consumer-facing staff; determine whether there is a need to notify other regulators; and prepare for interactions with stakeholders including key clients, counterparties, and shareholders.[7]

Retrospective application of new approach

1.26 The FCA has not provided any rationale for applying its new policy retrospectively to ongoing investigations. A retrospective application of policy is inappropriate and unfair. Additionally, there is a lack of clarity on how and when the FCA would decide to publicise existing cases and the manner in which such announcements would be made.

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[7] Firms with extensive international operations or which are part of a global group will face the added complexity of coordinating their response strategy across different legal jurisdictions and time zones.