TheCityUK

TheCityUK draft response to FCA CP24/2, Part 2 'Greater transparency of our enforcement investigations' (February 2025).

TheCityUK and its members remain fundamentally opposed to the FCA's proposals as outlined in both CP24/2 (Part 1) and CP24/2 (Part 2), as set out in our response to CP24/2 (Part 1) as well as this submission.

By answering the questions as set out in CP24/2 (Part 2) the FCA should not infer that TheCityUK agrees with the FCA's proposals. Please see our response to question 13 which notes there are alternative approaches that could be taken which would support the FCA's key objectives.
We appreciate the level of consultation undertaken by the FCA and offer these suggestions in a spirit of collaboration.

Assessing what is in the public interest
Staged decision-making process (see paras 4.1 – 4.10)
If we were to take our proposals forward, we anticipate taking a decision in stages, focusing on what is reasonable and proportionate at each step.

1. Do you have any comments on the proposed staged decision-making process to announce investigations?
Our response to the proposed staged decision-making process is below:

Whether any announcement of the investigation would be in the public interest
The proposals state that the FCA has identified 'potentially relevant' factors to consider when deciding if an announcement could be in the public interest and notes these are 'likely' to be relevant to whether the FCA would name the firm concerned in any announcement. This language is vague and uncertain, which contributes to the industry's nervousness about the lack of clarity and assurance on this policy as a whole. An explicit statement that the FCA operates with a basic presumption against announcement and a high bar to establishing public interest would be helpful.

Paragraph 3.7 of CP24/2 (Part 1) discusses the originally proposed public interest test: 'The factors set out above are non-exhaustive. We will assess whether to publish an announcement or update and what it should contain, including whether to name the subject of the investigation, on a case-by-case basis, taking all relevant facts and circumstances into account.'

CP24/2 (Part 2) is silent on whether this remains the case. We urge the FCA to provide clarity on this point. It is not clear whether the statement made in paragraph 3.7 of CP24/2 (Part 1) is still meant to apply and it is therefore difficult to fully respond to this stage of the FCA's decision-making process.

We welcome the FCA's proposed inclusion of the impact of those under investigation as a factor it would always take into account, as well as the impact on the financial system or markets. This was a key area of concern across the industry and it is right the FCA has recognised this and proposed appropriate action.

Further details on our views on the public interest test are below in response to question 2.

When the FCA might make an announcement

The FCA states in paragraph 4.9 of CP24/2 (Part 2) that 'under our current processes we undertake a thorough review at the 3-month point, which would likely be the earliest point at which we would consider the question of an announcement.'

It is not clear from the use of the word 'current' whether the FCA is indicating it may change its processes in the future. Similarly, the use of the word 'likely' provides the FCA with significant discretion as to the timing of when they consider the question of an announcement.

We recommend that the FCA make clear whether they intend to modify their current processes and that the final policy is also explicitly clear in the enforcement guide that, unless authorised in exceptional circumstances, the 3-month point is definitively the earliest point at which they would consider the question of an announcement. This is important given that CP24/2 Part 1 stated that the FCA would no longer consult on changes to its Enforcement Guide.

What the FCA might announce

The content in paragraph 4.10 briefly considers what the FCA might announce before discussing whether naming a firm might be in the public interest.

This section could have been clearer on the potential content of announcements and signposted respondents to the illustrative wording outlined in each of the case studies provided. Each of these examples ends with the line 'we have not reached any conclusions whether regulatory requirements have been breached.'

In our experience, such a statement will not prevent market participants, the press and the public from making adverse judgements and commentary about firms that are publicly named as under investigation. Such commentary can very rapidly spread at scale via social media to negatively impact a firm's reputation and commercial health.

For example, the Federal Reserve's review of its supervision and regulation of Silicon Valley Bank (SVB) noted that 'deposit outflows from increasingly cash-constrained tech and VC-backed firms quickly accelerated as social networks, media, and other ties reinforced a run dynamic that played out at remarkable pace'[1]. From a business perspective it can be difficult to engage with social media coverage as misinformation can occur as recognised by the president of the US Consumer Bankers Association who said the SVB situation was "fuelled by misinformation on social media"[2]. Patrick McHenry, then-chairman of the US House Financial Services Committee, referred to "the first Twitter fuelled bank run"[3].

Once a firm has been named we do not think that any further statement(s) can be guaranteed to mitigate the adverse impact. There is a real danger of significant reputational damage to firms, and to individuals whose lives may be seriously impacted, if publicly 'named and shamed' as subjects of investigations, even if they are subsequently exonerated of any wrongdoing. We note that the names of individuals undertaking senior management functions in firms are listed on the FCA

[1] Federal Reserve, 'Review of the Federal Reserve's Supervision and Regulation of Silicon Valley Bank', (April 2023) available at: https://www.federalreserve.gov/publications/files/svb-review-20230428.pdf

[2] The Guardian, 'The first Twitter-fuelled bank run': how social media compounded SVB's collapse, (March 2023), available at: https://www.theguardian.com/business/2023/mar/16/the-first-twitter-fuelled-bank-run-how-social-media-compounded-svbs-collapse

[3] Ibid

Register and it may be possible, particularly in the case of smaller firms, to deduce the names of individuals potentially impacted by announcing the name of a firm under investigation.

Experience suggests that announcements of corrections or exonerations do not gain as much media or social media attention as announcements of investigations or perceived wrongdoing. In any event, the existence in the public record of having been under investigation is likely to have an ongoing negative impact. For example, by making counterparties more reluctant to deal with the firm(s) in question.

These impacts could be long-lasting due to the length of time investigations take. The FCA's annual enforcement performance data for 2023/24 illustrated that 73% of enforcement operations closed in 2023/24 took longer than 24 months to close, with 27% taking longer than 60 months. The negative impact of being named as under suspicion of wrongdoing for so long is unlikely to be remediable even if the FCA goes on to issue a decision clearing the party.
For cases where an enforcement investigation concludes with the FCA taking action against a firm, the scope and subject matter of issues under investigation will often materially change in scope from the outset of an investigation to its conclusion. In those circumstances and where the FCA's initial announcement includes the scope of the investigation, this could generate speculation – potentially without foundation – which the firm will be unable to respond to and may materially damage a hard-won reputation with material unquantifiable impacts for the firm in question.

For example, the impact for some firms will be magnified and perpetuated by being included in reporting across a range of online sources. Such reporting tends to persist for years, even after a case has been closed, serving to lock in the negative impact on named firms, even if ultimately cleared.

The revised public interest assessment (see paras 4.1 – 4.10)
We have identified potentially relevant factors to consider when deciding if an announcement could be in the public interest.

2. Do you have any comments on the factors we have identified, or further factors we should consider?
We are concerned that the public interest framework outlined in paragraph 4.10 of CP24/2 (Part 2) remains in favour of publication or naming a firm, which suggests a presumption toward publication or naming despite the FCA's stated view that only a small number of enforcement investigations will be impacted by the new proposals. As stated above, we consider a stated presumption against publication would bring helpful clarity.

The factors outlined in favour of publication or naming are broadly framed and frequently say action is 'likely' to achieve certain outcomes. This is in sharp contrast to the factors outlined against publication or naming, which use words such as 'serious' and 'severe', suggesting a higher bar will be used to determine that publication or naming is not appropriate. The FCA has significant discretion in justifying 'likely', while it is harder for a firm to make representations about 'serious' or 'severe' impacts.

There is a lack of clarity about how the FCA could interpret whether publication would have a 'severe impact' on a firm. CP24/2 (Part 2) references the potential for firm size to be a 'particularly relevant' factor. This poses concerns around consistency of approach, including whether there is a

level playing field. There are concerns that for larger or multi-sector firms there will be a higher bar set for factors mitigating against publication or naming.

The potential for negative impact on a firm could be assessed at the level of the product or service in question. Even for a larger firm, publication could have a significant impact on its activity in a specific market or sector. Overall share price impact is insufficient as a measure of impact. The potential for loss of revenue, impact on current or future clients, and overall reputation risk – all assessed at the level of the impacted product/service – should be considered. The overall size of a firm is considered to be a blunt measure.

Furthermore, and as outlined in our response to question 1 above, the FCA states that the framework is 'non-exhaustive'. This means it is not possible to consider the framework with any degree of certainty or predictability.

As noted above, the proposals give the FCA wide discretion to act, including based on unpublished criteria which it deems to be 'relevant facts and circumstances'. This results in a hugely uncertain landscape in which firms must operate and amplifies concerns about harsh judgements reached in retrospect or in the face of political or media pressure.

There is significant industry concern about the potential for lack of consistency in how investigations and announcements are taken forward and considered, due to the lack of clarity on how the framework would operate in practice. This includes the potential for the issue of whether a firm would be publicly named to be a factor in any negotiations during the investigation process.

Applying our proposals to our existing investigations (see para 4.12)
We are amending our proposals to make clear that we would only announce or update on existing investigations where the announcement would be reactive.

3. Do you have any comments on this suggested change?
We understand the pressure to make a reactive announcement where a firm has self-announced or where another regulator has legitimately done so. The content in paragraph 4.12 of CP24/2 (Part 2) suggests that the FCA would not announce or update on existing investigations where the fact of the investigation is not already in the public domain, and the FCA should make this explicit. In addition, the FCA should confirm that even if the fact of the investigation is already in the public domain the FCA will apply the safeguards outlined in response to question 5 below. This includes communicating openly with the firm in question and establishing whether it would be in the public interest for it to reactively confirm the fact of the investigation.

Giving firms time to respond (see paras 4.14 – 4.16)
We would generally share a copy of the proposed announcement and provide firms with at least 10 business days to make any representations to us. This may also give firms time to consider whether they want, or may be required, to make an announcement themselves. If, after considering the firm's representations, we still decide to publish an announcement, we would share our reasons and give firms a copy of the final text at least 2 business days before we publish it.

4. Do you have any comments on these proposals?
We welcome the revised approach and think this is a marked improvement on the original proposals as set out in CP24/2 (Part 1). However, to ensure firms have an opportunity to fully engage with the FCA on the rationale for the proposed disclosure, the FCA should provide its written reasons supporting the disclosure allowing for written representations and responses from firms. The FCA should also ensure appropriate governance is in place (see safeguards in response to question 5 below) before it informs a firm of its intention to publish.

Once the FCA has informed the relevant firm of its intention to publish, the firm should be given 10 business days to consider its next steps and respond to the FCA (during which time we anticipate firms may wish to consider an application for an injunction).

CP24/2 (Part 1) includes an annex setting out the amended FCA Enforcement Guide (EG). Paragraph 2.3 of the amended EG refers to the potential for scoping discussions with the firm or individual concerned and notes that, if appropriate, these will be held close to the start of an investigation.

The industry would welcome clarification on whether this remains the case and whether such scoping discussions would take place before the 'at least 10 business days' notice period outlined in paragraph 4.15 of CP24/2 (Part 2). In addition, it would be helpful if the FCA could provide clarity on the circumstances in which it might provide firms with more than 10 business days to make representations.

Safeguards (see para 4.17 – 4.19)
We have provided detail on our process when deciding whether to announce.

5. Do you have any comments on these proposals?
We are concerned that the proposed decision-making process outlined in paragraph 4.17 of COP24/2 (Part 2) gives rise to the potential for different outcomes in similar cases and could lead to differing treatment of firms in similar cases.

We therefore urge the FCA to implement a two-stage approval process as outlined below:

- A standing committee of at least three FCA Executive Directors (to include at least one Executive Director who is not responsible for enforcement) considers the facts of the case and makes a recommendation on whether the FCA should announce that a firm is under investigation, when it would be announced, and what would be said in the announcement. For PRA-authorised firms, there should be a formal obligation for the FCA to liaise with the board of the PRA and seek their consent to announce.
- The recommendation is subject to scrutiny by the Regulatory Decisions Committee, whose stated purpose is to help ensure that contested enforcement decisions are made fairly, and is described as the final stage of decision-making within the FCA.

We believe this approach would put in place greater safeguards than CP24/2 (Part 2) currently proposes and is a workable proposal given the FCA's stated intention that announcements would be made in a very small number of cases. Implementing such safeguards would also provide

reassurance to firms that they would not be wrongly named, as per the example of an insurance firm which was wrongly named by the FCA[4].

We welcome feedback on these case studies, including on whether the public interest would be served in naming these firms while under investigation when we have indicated we might do so.

Each of the case studies outlines factors in favour of making announcements. However, we do not agree with the FCA's conclusions in these case studies. The FCA's overall approach and analysis of the public interest test factors demonstrates a lack of evidence and does not fully consider the potential impact of such announcements.

For example, an anonymous announcement can demonstrate focus on a particular area, helping to deter wider misconduct, as well as providing clarity and addressing speculation as noted in another of the case studies. We would encourage wider use of communications of this sort.

Assertions around protecting the integrity of the UK financial system are unclear. A public announcement could undermine broader investor confidence. Furthermore, references to a company's size or the size of other firms in a particular market are not evidence-based. It has been suggested that to ensure a balanced approach to the case studies the FCA could have provided examples of cases where the FCA would have named/ considered naming firms under their current proposals, but where the investigation ended with no action being taken.

Case Study 1 – British Steel Penson Scheme (see para 5.4 – 5.12)

6. Do you have any comments on this case study?

Case Study 2 – Citigroup Global Markets Limited (see para 5.13 – 5.20)

7. Do you have any comments on this case study?

Case study 3 – PricewaterhouseCoopers LLP (see para 5.21 – 5.28)

8. Do you have any comments on this case study?

Case Study 4 – CB Payments Limited (see para 5.29 – 5.40)
9. Do you have any comments on this case study?

Where we might announce but not name the firm (see paras 5.41 – 5.48)

10. Do you have any comments on the examples provided of when we might announce but not name the firm?
Given our concerns about the public interest test, we agree there will be benefits in announcing investigations but not naming the firm(s) concerned. This is an approach the FCA should consider as an alternative to its proposals.

[4] 'UK financial watchdog mistakenly named insurer placed under review' available at: https://www.ft.com/content/5a925d86-82ba-4cc7-a2ee-142ca7eb06ae

CP24/2 (Part 1) notes three significant benefits of communicating more about FCA investigations. We believe that these benefits can be achieved by adopting a fully anonymised and thematic approach to communications regarding FCA investigation and enforcement activity.

There are also several existing alternative means to achieving these proposed benefits without causing harm to firms (and their customers) under investigation, such as through 'Dear CEO' letters, industry workshops, speeches, seminars and press articles.

In CP24/2 (Part 2) paragraph 5.42 appears to downplay the potential benefits of publishing anonymised information by referring to it as 'reactive'. We believe that proactively publishing anonymised information e.g. through the FCA Market Watch can help the FCA to achieve its stated aims.

Impact of proposals on firms (see paras 6.1 – 6.15)

We propose including impact as a factor in our public interest framework with a 10-day window for representations.

11. Do you have any comments, data or evidence on the potential impact of our proposals on firms?

The FCA has taken some steps to assess the potential impact of an announcement on a firm. However, it is important to note that, in keeping with FCA guidance for investment firms, past performance is not a reliable indicator of future results.

It is by no means certain that a listed firm being named will not be associated with a fall in the firm's share price. Furthermore, thousands of FCA firms are not listed and could be more susceptible to reputational and financial damage if customer or (private) investor confidence in the business is damaged.

By affecting market confidence in a firm that is subject to an FCA announcement, the proposals risk negatively affecting the Prudential Regulation Authority's (PRA) objective to promote safety and soundness and the Bank of England's (BoE) objective to promote financial stability. This is particularly the case given the risk of some media outlets and social media sensationalising announcements and potentially prompting a loss of consumer/market confidence in a firm. Such reporting could also result in potentially unwarranted complaints to the Financial Ombudsman Service (FOS) and unintended consequences, such as the targeting of a firm by claims management companies.

Competitiveness (see para 6.16 – 6.29)

We will continue to consider carefully evidence on growth and competitiveness as we decide on our approach and welcome further feedback.

12. Do you have any comments, data or evidence on the potential impact of our proposals on growth and competitiveness?

The FCA's approach as set out in both CP24/2 (Part 1) and CP24/2 (Part 2) undermines regulatory certainty and predictability, which the FCA Chief Executive noted in a recent letter[5] to the Prime

[5] FCA letter to the Prime Minister, Chancellor and Secretary of State for Business and Trade on 'a new approach to ensure regulators and regulations support growth', available at: https://www.fca.org.uk/publication/correspondence/fca-letter-new-approach-support-growth.pdf

Minister, the Chancellor and the Secretary of State for Business and Trade 'underpin business and investor confidence.'

Furthermore, the proposals are counter to the Chancellor's call, as set out in the FCA's remit letter[6], for proportionate and effective regulation. A significant number of FCA investigations close with no further action being taken. Even if the FCA reduces this from the current level of circa 65% to, for example, 50%, we question whether the potential harm to firms and the UK's overall attractiveness is proportionate to the FCA's objective of increasing the transparency of its enforcement function.

The FCA's assertion that the proposed changes are compatible with its secondary international competitiveness and growth objective does not appear to be evidence-based. The proposals are out of kilter with how other jurisdictions operate - including in the EU, Hong Kong, the USA and Singapore - and risk making the UK a less desirable place to invest and conduct business. For example:

- In the US, the Securities and Exchange Commission's (SEC) Enforcement Manual mandates confidentiality during the investigation process: 'It is the general policy of the SEC to conduct its investigations on a confidential basis to preserve the integrity of its investigative process as well as to protect persons against whom unfounded charges may be made or where the SEC determines that enforcement action is not necessary or appropriate…the SEC cannot disclose the existence or non-existence of an investigation or any information gathered unless made a matter of public record in proceedings brought before the SEC or in the courts'.
- In the EU, the European Securities and Markets Authority (ESMA) does not disclose information about the start of an individual investigation.
- In Singapore, the Monetary Authority of Singapore (MAS) does not normally publicise enforcement actions before they are concluded. The abiding consideration appears to be whether it is in the public interest to make an announcement, and it will also consider whether an announcement will jeopardise the investigation or prejudice court proceedings. Empirically, the announcement of investigations which are ongoing and not yet concluded is rare, and analysis suggests that in the 18 months covered by the latest enforcement report, they published less than 1% of such cases.

The proposals are also out of kilter with the BoE/PRA approach, who make clear that they 'do not usually make public the fact that we are investigating a particular firm or individual'. In determining whether to make a public announcement, the PRA would 'consider any potential prejudice, risk of unfairness and/or disproportionate damage' to investigation subjects and not publish information having determined that publication would be: (a) unfair to the persons concerned; (b) prejudicial to the safety and soundness of relevant bodies; and (c) detrimental to the stability of the UK financial system. It seems contrary to principles of consistent and sound regulation for UK regulators to adopt different standards and approaches for enforcement.

[6] Recommendations for the Financial Conduct Authority, available at: https://assets.publishing.service.gov.uk/media/673712ee12f25d73081271e8/CX_Letter_-_Recommendations_for_the_Financial_Conduct_Authority__FCA__-_Nikhil_Rathi_14112024.pdf

Finally, we agree with the statement in the House of Lords Financial Services Regulation Committee's report 'Naming and Shaming: How not to regulate' [7] that the FCA 'should carefully consider the ways in which its proposals might adversely impact its secondary objective before it proceeds with implementing any changes to its enforcement regime'. We support the recommendations in that report that the FCA should engage with HM Treasury over any future developments to these proposals.

Other comments

13. Do you have any other comments in response to our paper?
As set out in our response to CP24/2 (Part 1), TheCityUK recognises the importance of enforcement to the FCA's role in protecting consumers from harm and in meeting its other statutory objectives. We appreciate the FCA's engagement with us and others across the industry since the proposals were originally published.

However, it is our view that the FCA has not shown that its proposals as set out in CP24/2 (Part 1 and Part 2) will advance its objectives. In particular, we believe that the introduction of a new, broad public interest test in place of the narrower exceptional circumstances test is unnecessary and would increase the culture of regulatory uncertainty, which our members report is already damaging the UK's competitiveness. This uncertainty is heightened by the potential for greater levels of disclosure in ways which are not currently envisaged by this proposal - but could occur given the broad discretion the proposed public interest test provides.

There are alternative approaches that could be taken, which would support the FCA's key objectives on enforcement while avoiding these unintended harmful consequences. They include:

- Retaining and refining the exceptional circumstances test: The FCA's existing framework already allows for announcements about investigations in rare cases, using its powers in EG6.1. Of the 42,000 firms regulated by the FCA, only 10-12 are expected to be referred each year for formal investigations. Instead of a new public interest test, the current framework should be retained, with potential clarification – undertaken with industry input – of EG6.1 and applied to these investigations to determine which (if any) of these should be published. This recognises that the FCA has adopted an unnecessarily restrictive interpretation of what constitutes exceptional circumstances. We believe there is sufficient flexibility within the wording of the existing test for the FCA to make the incremental change it is seeking, without needing to replace it with a new public interest test.
- We also think there is a case to introduce new, specific circumstances in which the FCA can reactively confirm the existence of investigations. For example, in cases where the firm itself has made an investigation public, or where another enforcement agency has already legitimately done so. These situations do not fall under the current 'exceptional circumstances' test but could be set out simply and clearly, with the appropriate safeguards suggested in our response to question 5, without the need for a new public interest framework.
- Sharing anonymised information on enforcement activity: Regular anonymised updates, similar to the FCA's Market Watch publication, would provide insight into the FCA's enforcement activity, including the nature of firms, sectors and issues involved, without the damage that

[7] House of Lords Financial Services Committee, (February 2025) Naming and shaming: how not to regulate' available at: https://committees.parliament.uk/committee/697/financial-services-regulation-committee/news/205116/failings-in-fca-proposals-to-publish-enforcement-investigations-highlighted-by-committee-report/

would be caused by naming individual firms prematurely. We strongly support the introduction of such a publication.

- Focusing on areas where most enforcement activity occurs: Public notifications should focus on the harmful activities of unregulated firms and regulated firms operating outside the regulatory perimeter. Around 60 per cent of outstanding enforcement operations are accounted for by such activities. Redoubling efforts in these areas would tackle consumer harm while protecting reputable, regulated firms.

More broadly, we believe deterrence should be achieved through the punishment for wrongdoing, including publicity of that punishment (indeed the FCA Decision Procedure and Penalties manual makes clear that the principal purpose of penalties is to deter wrongdoing). It should not extend to harming firms that have yet to be found (and indeed may not be found) to have committed any wrongdoing and should therefore benefit from a presumption of innocence.

An FCA spokesperson recently said[8], in response to the FCA mistakenly naming a firm subject to a skilled person's review, "the fact of a review does not indicate any wrongdoing, which is why they are generally kept confidential." We believe this statement provides a clear rationale for why the FCA should not implement these proposals.

In conclusion, the FCA should not proceed with these proposals. It should instead work with the industry to bolster its current approach and implement a proactive, anonymised enforcement watch publication, alongside associated firm and consumer communications.

[8] 'UK financial watchdog mistakenly named insurer placed under review' available at: https://www.ft.com/content/5a925d86-82ba-4cc7-a2ee-142ca7eb06ae