



# **A response by UK Finance to the FCA's Consultation Paper CP24/2, Part 2**

Greater transparency of  
enforcement investigations

February | 2025

1. UK Finance<sup>1</sup> is pleased to respond to the FCA's [CP 24/2, Part 2](#) on its proposals to increase transparency about its investigations.

## A. Key messages

- UK Finance members remain opposed to the FCA's revised proposals. They should be withdrawn in their entirety.

In our view the proposals are:

- **Uncompetitive internationally and will impede UK growth** – they continue to be misaligned with the approach of other international regulators and nationally, when compared with the Prudential Regulatory Authority (PRA). This will impact the UK's competitiveness and risks positioning the UK as an international outlier, which is at odds with the Government's priority of advancing international competitiveness and promoting growth.
- **Unfair** – the FCA's revised proposals are unfair to firms that are the subject of an investigation. Where the FCA has announced an investigation but not its outcome, the public, politicians and the media are likely to speculate or assume that the firm is guilty of misconduct before an investigation has been completed and due process followed, irrespective of caveats and disclaimers. The FCA's proposals risk causing irreparable harm and damage to a regulated and/or listed entity's business and reputation for no good reason - particularly in circumstances where the investigation concludes with no finding of misconduct or regulatory breach.
- **Uncertain** – the revised criteria proposed in CP 24/2, Part 2 for the FCA to decide what is *'in the public interest'* is too vague. The public interest test provides the FCA with wide discretion over making an announcement that is broad and unpredictable. A firm will not be able to know whether the FCA will actually announce their investigation. This damages a firm's ability to plan and do business and raises risks of the FCA behaving inconsistently between different sized firms, potentially impacting competition.
- **Unjustified** – the FCA has not made a clear or well evidenced case for change. The FCA's reasoning for making changes in relation to investigations into firms seems to have become clouded by concerns about its investigations into other types of company (for example unregulated firms involved in financial crime, or what listed companies are

---

<sup>1</sup> *UK Finance is the collective voice for the banking and finance industry. Representing 300 firms, we're a centre of trust, expertise and collaboration at the heart of financial services, championing a thriving sector and building a better society.*

required to say to the market for other reasons). The FCA has tried to argue in Part 2 that its revised proposals would only mean a '*small incremental change*', but by the FCA's own admission, the cases will double in numbers under the new rules and there is no guarantee that over time, more and more cases will not be announced. The FCA's logic for change is unclear and contains insufficient guardrails.

- **Unnecessary** – the FCA's existing rules already strike the right balance, i.e. if a firm has done something wrong, that is made public, but only after the FCA has carried out an investigation and followed due process in which the firm has an opportunity to defend itself. If, exceptionally, the FCA needs to announce an investigation earlier, its current rules already allow for that. The current rules should remain in place.
- **Require guardrails** – the House of Lords' Financial Services Regulation Committee's (FSRC) report has recommended that the FCA evidence how it has addressed stakeholders' concerns, reporting back with its findings before any changes are implemented. Our members' view remains that a change in enforcement approach is not required. However, in circumstances where the FCA continues with its proposals, which we oppose, there will need to be certainty, governance and appropriate guardrails in place around publication. Our suggestions around these are set out in Section E of our response.
- We encourage the FCA to use anonymised announcements which we believe will provide many of the benefits it is seeking to achieve.
- The FCA should consider the real and significant negative impacts and cost implications of its proposals on claims management company (CMC) activity that the announcement of an enforcement investigation would bring.

## B. Proposals we support

2. We note that the FCA has adjusted its position as a result of widespread concerns raised about its initial proposals in UK Finance's April 2024 [response to CP24/2](#), as well as by other trade associations, members and other interested commentators, including Parliament. The FCA's endeavours to address our members' opposition to Part 1 of CP 24/2 is welcomed, but we remain completely opposed to the proposals.

Our members understand that about 60% of the currently outstanding 42 operations relate to unregulated and unlisted firms or regulated firms conducting business outside the scope of their authorisations. We fully support the FCA's investigations into fraud and financial crime and our members are committed to supporting it in this important work.

3. We note that the catchall '*otherwise advancing its statutory objectives*' in the public interest framework has been removed. We support the removal of this unnecessary test. All actions taken by the FCA should be in pursuit of advancing its statutory objectives,

recognising the new public interest framework has accounted for concerns such as public confidence in the financial system or market which could, as the FCA acknowledges mitigate, against making an announcement, albeit in our members' view this assessment is flawed, subjective and should be removed.

## A. Our concerns with the revised proposals

4. There remain very material issues with the proposals and our fundamental concerns remain the same. The proposals wholly *alter the current enforcement regime*, which strikes the right balance between transparency and guarding against potential prejudice to firms and individuals. The FCA continues to seek to 'name and shame' our members which, in our view, will provide minimal educational benefit (contrary to the FCA's intended purpose), and we remain emphatically opposed to them, for the reasons set out below.

*We are not convinced these changes are required*

5. The FCA has still not made a convincing enough case as to why the provisions as set out in this revised consultation are required. Neither has the FCA provided clarity regarding when it might make an announcement, or what the FCA might announce, nor are we satisfied that there is sufficient certainty regarding the criteria to be used for the public interest test. The FCA's letter to the Prime Minister of 16 January 2025 states: "Certainty and predictability underpin business and investor confidence." We fully support this. As currently framed, we regard these proposals as uncertain and unpredictable and likely to have adverse impacts for UK competitiveness and growth.
6. We believe the FCA already has sufficient tools to operate an efficient enforcement function, without the need for an overlaid "name and shame" public interest test. These can encourage industry to learn from the mistakes of others, improve standards across industry and still promote the UK growth and competition agenda whilst underpinning the reliability of and trust in financial services sector without the need for a "name and shame" culture.

*Re-writing of the presumption of innocence*

7. The revised proposals do not address our members' fundamental concern that a firm should *not be presumed guilty before any wrongdoing has been established*. This is contrary to well-established legislation and judicial precedent. Paragraph 4.9 of CP 24/2, Part 2 states 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.*" Even under the FCA's revised proposals, it is clearly possible that the FCA will decide it is in the '*public interest*' to:
  - a) announce it is investigating only 3 months into an investigation, before evidence has properly been gathered,
  - b) causing reputational damage to firms, and,

- c) then go on to find out that the firm is not guilty of any misconduct at all.
8. In such cases, a firm will have unfairly suffered damage to its business and reputation for no reason. Even if the FCA were to try to correct this through a further announcement, public perception would likely remain that the original announcement evidenced that the firm had done something wrong. This *presumption of innocence is a foundational principle* of our country's legal system and the FCA has made no case for departing from it<sup>2</sup>.
  9. Whatever the FCA may believe, and however much any announcement is caveated, in the court of public opinion, perhaps orchestrated by social media if not the more conventional Fourth Estate, the common assumption will be that there is 'no smoke without fire', leading to a widespread assumption of misconduct before an investigation has been completed and due process followed.
  10. We note that in response to the recent erroneous identification of a subject of a section 166 review the FCA confirmed to the FT that 'the fact of a [supervisory] review does not indicate any wrongdoing, which is why they are generally kept confidential'. We believe the same understanding of the consequences of premature disclosure should logically extend to the FCA's enforcement work.

#### *Enduring reputational harm and damage to business*

11. Users of social media - influencers and consumers of their output – are unmoored from time and space. Some may be disrespectful of 'old 'sources of technocratic authority and disbelieve and instinctively ignore any caveats included in a notification of the commencement of an investigation, *not looking beyond the headline*.
12. We note that in the analysis of the impact on firms, while the risk of losing clients and, in general terms, prudential concerns, are mentioned, *the risk of deposit flight* is not explicitly mentioned. Based on recent experience with the role of social media in depositor behaviour, this should be an explicitly considered decision factor if the FCA decides to proceed with its proposals to announce that an investigation is being made, especially where retail deposit funding is a key part of a firm's overall funding profile.
13. Irrespective of whether disclaimers such as "*we have not reached any conclusions whether regulatory requirements have been breached*" will be attached to any announcements these will likely be insufficient for the press, industry and public. They will likely interpret an investigation as synonymous with a final decision of a breach or misconduct. By way of example, in a recent case, the disclaimer that "*any findings in the*

---

<sup>2</sup> We note that the FCA has made its proposals in the year that sees the 800<sup>th</sup> anniversary of the signing of the last Magna Carta.

*decision notices and the descriptions of those findings in this press release are provisional*' was ignored by several media outlets as being final<sup>3</sup>.

14. In the FCA's predecessor's DP08/3 '*Transparency as a Regulatory Tool*' the then FSA recognised that publication "*may create unwarranted public concern about the matters and persons within the scope of an investigation.*" This risk has only worsened since the proliferation of social media and the emergence of agentic AI technology, and we again query the purpose of the proposals.
15. Similarly, while the FCA's intention is not to divulge the names of individuals linked to an enforcement investigation, *senior managers are easily identifiable* via the FCA Register. We understand from comments by UK regulators that the SM&CR regime has largely achieved its intended outcome; senior managers take their personal accountability seriously and put reasonable steps in place to discharge their obligations. It is therefore foreseeable that senior managers who are implicitly involved in an enforcement investigation could face significant unfair treatment by external stakeholders such as, clients, public sector bodies or recruiters during the time of the FCA enforcement investigation. This initiative will also have a tangible adverse impact on the recruitment and retention of Senior Managers which is already a significant industry concern.
16. An announcement made today *will perpetually exist in unregulated, borderless cyberspace*. Commentators globally could 'take up the cause', despite having no connection at all to financial activities in the UK – which is the FCA's natural jurisdiction. Subsequent exoneration of a firm's actions following an FCA investigation may not receive the same attention or may even, in some instances, be actively disbelieved.
17. This underscores our members very real concern that *their firm's reputation will be impacted around the world and for all time* as a result of the publication of enforcement activity before any material investigation work is done or any regulatory breach identified. This is the stark reality of reputational risk now and in the future. The FCA's plans to announce the opening of an investigation will adversely exacerbate this.
18. The *damage to firms could be irreparable* and the FCA's narrow focus on share price/ market value is insufficient truly to measure the impact on firms. The potential for loss of clients, distributors and suppliers, reputational risk and loss of revenue are all relevant factors, and the burden should be on the FCA to demonstrate why its proposals to

---

<sup>3</sup> [FCA publishes Decision Notices for Banque Havilland SA and three of its former employees | FCA](#)

publish are proportionate, notwithstanding the absence of any comparable international example.<sup>4</sup>

### *International Outlier*

19. As we demonstrated in our earlier response (Annex A, pages 28 to 41) the FCA's proposed *approach to public notification* of an investigation is a world-unique approach. The FCA has conceded this. There is a clear reason why few regulators across the world announce investigations at an early stage. The risks – especially the risk of unfairness – of making the issues public before the investigation work has been done are too great!
20. This risk that a third country firm's reputation in its home market could be tarnished by an FCA announcement in the UK is significant and will deter third country firms from investing or basing branches in the UK. The FCA's revised proposals remain disproportionate with a lack of evidence-based reassurance from the FCA regarding the UK's competitiveness and growth strategy. They add to an "*emerging narrative of overly interventionist regulation within the UK*"<sup>5</sup>. The proposals will make the UK an outlier hurting the UK competitiveness agenda. This will deprive the UK of investment and innovation, both in the short term and long run.
21. The FCA has asserted that no other regulator around the world has the same breadth of responsibilities as it does. We query the factual basis for this statement.

### *Inconsistent with PRA review*

22. Contrary to the FCA's approach, the PRA does not announce publicly the fact that it is investigating a particular firm or individual. The PRA considers "*any potential prejudice, risk of unfairness and/or disproportionate damage*" to investigation subjects and does not publish information if that publication would be:
  - a) Unfair to the investigation subjects and other persons concerned,
  - b) prejudicial to the safety and soundness of relevant bodies and,
  - c) detrimental to the stability of the UK financial system.

---

<sup>4</sup> Contrary to Part 1 of the consultation, Part 2 of CP 24/2 accepts that internationally "*few financial services regulators*" announce their investigations. The FCA's position as an international outlier (a point conceded by the FCA's CEO in the letter to the HoL FSRC and in Part 2 of CP 24/2), the c.50,000 firms that it regulates, the rationale for wanting to align with its UK partner regulators (as opposed to its international competitors) appears unclear. The majority of UK regulators (including the PRA, the PSR and the Pensions Regulator) do not ordinarily publish the fact of enforcement investigations, unless there are exceptional circumstances. The CMA and OFGEM have a statutory footing for their publication.

<sup>5</sup> Paragraph 75, page 24 of the House of Lords' Financial Services Regulation Committee '*Naming and shaming: how not to regulate*', 6 February 2025,

The wording of the PRA's test of whether to publish the fact of an investigation is remarkably similar to that of the FCA's current Enforcement Guide.

23. The proposed inconsistency of enforcement approach between UK regulators is not understood and will increase regulatory uncertainty.

#### *Irreparable Harm to UK Growth and Competitiveness*

24. A stable, predictable and consistent regulatory regime provides the UK with a competitive advantage. The FCA's proposals create unpredictability which leads to uncertainty, jeopardising competitiveness and investment and growth in the UK. If implemented, they will damage the UK's international reputation.
25. The revised proposals are contrary to the clear messaging from both the Government and Parliament to the FCA that it should prioritise economic growth and international competitiveness. We reiterate the sentiments of the Chancellor in her letter to Nikhil Rathi on 14 November 2024 "*we must have proportionate, effective regulation that allows firms of all sizes to compete, innovate and grow, create (sic.) a stable, attractive environment which encourages businesses to establish and expand in the UK and adequately protects consumers. A thriving, internationally competitive financial services sector, regulated by independent expert regulators with a global reputation for promoting stability and facilitating innovation, is essential for creating the conditions for businesses and consumers to invest with confidence.*"<sup>6</sup> We consider the proposals under CP 24/2, Part 2 are wholly disproportionate to the FCA's objective of increasing transparency and the FCA's assertion that the changes are compatible with its secondary objective for competitiveness and growth lack any factual basis or exploration.
26. We also share the views set out in the House of Lords FSRC report 'Naming and Shaming: How not to regulate' that "we remain unconvinced that the FCA has adequately demonstrated how the proposals contained in CP 24/2, Part 2 align with its secondary international competitiveness and growth objective" and the recommendation that the "FCA should engage with the Treasury over any future developments relating to its enforcement investigations proposals to ensure that they are aligned with the Government's view of the secondary international competitiveness and growth objective."<sup>7</sup>

#### *The proposals are premature*

27. We understand that historically at least two thirds of investigations have resulted in no action even despite extensive supervisory engagement. So, we would recommend that

---

<sup>6</sup> [CX Letter - Recommendations for the Financial Conduct Authority FCA - Nikhil Rathi 14112024.pdf](#)

<sup>7</sup> [Naming and shaming: how not to regulate](#)

the FCA cancel, or at least suspend, these plans and instead use its resources to continue to improve the quality, pace and focus of FCA investigations.

28. Any future consideration of naming and shaming principles should only take place once the FCA has reached a stage where there is evidence that two thirds of closed investigations have resulted in actions and the time to assess investigations has significantly reduced. This would help protect the confidence in the effectiveness of the FCA, and in return enhance confidence in the UK's financial services sector.

#### *Legal authority for the proposals*

29. The FCA's revised proposals do not engage with the question of how it considers it has the legal authority to publicise ongoing enforcement investigations, despite this question being raised many times in responses to the first consultation. The FCA's predecessor, the FSA, repeatedly accepted the legislative intention of Parliament when FSMA was being debated, prior to its inception, to not publish any information into ongoing enforcement investigations, by confirming that FSMA contained "*an explicit ban on the FSA publicising enforcement action until the full process, including any tribunal proceedings, has been completed*" and that "[t]he FSA Board attaches great importance to its ability to deliver effective enforcement action; such action can be effective only if it is seen to be fair."
30. It is inadequate for the FCA simply to claim that its revised proposals "*would be in line with our statutory requirement to exercise our functions transparently and ...in a way which is consistent with all our statutory objectives*"<sup>8</sup>. If the FCA is "not seeking to do something new" we query, why the changes are required at all, given it is only proposing "incremental changes" and can already publicise enforcement investigations in exceptional circumstances.

#### *The scale of the change is inappropriate*

31. The FCA has tried to reassure industry that there will be no presumption in favour of publishing, but rather that the proposal is to make announcements in only a "*small incremental number*" of cases. This appears to contradict the wholesale change that the FCA now proposes. A '*small incremental*' increase does not appear to provide an accurate depiction of how many cases could be published under the new test and does not provide any comfort to firms. The FCA argues that there will be fewer enforcement cases in future. Notwithstanding the FCA's reassurances:

---

<sup>8</sup> Memorandum by the Financial Services Authority, published by the Joint Committee on Financial Services and Markets in April 1999, paragraphs 20 and 21.

- a. the FCA now proposes to move from an announcement of 14% of cases under exceptional circumstances to 28% of cases (i.e. double the amount of instances of announcements than under the current regime),
- b. the FCA's numbers are based on only 19 months of enforcement data as opposed to a potential of 20 plus years of data,
- c. the public interest (PI) test will still give wide discretion to the FCA irrespective of the current intentions of the Enforcement Directors, and
- d. there is no guarantee that the FCA's current position of '*small incremental numbers*' will not change in future, particularly under new leadership, a point which the FCA has failed to address in industry roundtables.

### *No cost benefit analysis*

32. We refer to the recent exchange of views at the House of Lords FSRC about the absence of a cost benefit analysis.<sup>9</sup>
33. The House of Lords report reiterates that: *"it remains our firm view that proposed changes of this extent necessitate a robust and detailed analysis of the direct costs to the sector. Wider factors in the UK's growth and competitiveness should form part of this analysis. The need for such an assessment will be underscored if, as happened following the publication of the first consultation, the feedback the FCA receives on its second consultation reiterates the call for a cost benefit analysis – the FCA must be transparent about the views expressed on this issue."*<sup>10</sup>
34. Our view also is that these proposals should have been the subject of a cost benefit analysis. It appears perverse that the FCA is proposing a public interest test involving, among other aspects, '*severe impact*' but is unable to demonstrate the benefits relative to the costs through a cost benefit analysis. Irrespective of the broader debate about when cost benefit analyses should be required, we consider that the significant nature of these proposals should have given rise to a cost benefit analysis.

### *Market Abuse Regulation position misstated*

35. In the FCA's letter of 18 March 2024 to us and the other trade associations it was asserted as a fact that a listed firm is already required to make an announcement if it believes the fact of the investigation is likely, in itself, to affect its share price. In CP 24/2, Part 2 it has again be asserted: "Firms listed in the UK and other issuers of shares publicly traded in the UK (for example on AIM), or on an EU regulated market or trading venue, are already generally required by the Market Abuse Regulation (MAR) to publicly

---

<sup>9</sup> [committees.parliament.uk/oral-evidence/14996/pdf/](https://committees.parliament.uk/oral-evidence/14996/pdf/)

<sup>10</sup> [Naming and shaming: how not to regulate](#)

disclose FCA investigations where the fact of those investigations would be inside information.”

36. Our response to this repeated assertion is the same as we and others previously responded - that the assertion seriously misstates the requirements of UK MAR. The fact that a regulatory investigation has been commenced does not necessarily amount to inside information and requires application of all the applicable aspects of UK MAR to the particular facts and circumstances, in particular the application of the reasonable investor test taking into account the likely effect of the information on the price of listed securities, and whether any delay to disclosure is permitted.
37. We urge the FCA to be very clear and precise about this point. Clarification is required as to whether the FCA suggesting that one or both of the fact of a listed firm receiving 10 business days’ notice to make their representations to the FCA, and/or the fact of a listed firm receiving a further 2 business days’ notice of publication of any announcement if the FCA decides to proceed, after taking these representations into account, would constitute inside information which is generally required to be announced? If this does constitute inside information the FCA’s proposals would create a self-fulfilling requirement on the listed firm to make its own announcement.

#### *Expanded public interest test factors*

38. We note that the *degree of impact of a potential announcement* to be considered by the FCA has also been amended, raising the threshold from the current Enforcement Guidance test of ‘*potential prejudice*’ to ‘*severe impact*’ again making it more difficult for a firm to challenge the FCA’s decision, because of the subjective nature of such assessments and the difficulty of proving before the event the impact and its severity after the event.
39. The ‘public interest’ test factors have been expanded to include two mitigating factors against publication. These indicate *a much higher bar for firms to meet* which is not appropriate, including the wording “*severe*” and “*serious impact*”.

For example, contrasting the factors mitigating *against* publication:

- *If public confidence in the financial system or market could be seriously disrupted by an announcement.*

With a factor *in favour* of publication:

- *“Publishing is likely to be in the interests of potentially affected customers, consumers or investors and/or customers, consumers or investors more generally.”*

40. There is also a distinct lack of information regarding how the FCA could interpret whether a publication would have a “*severe impact*” on a firm. This creates uncertainty for firms. The proposals also recognise that there will be an inconsistent approach as to what will

be announced and the potential impact on a firm. The FCA states “*firm size may be particularly relevant in this consideration.*” This will create an uneven playing field where larger or international firms will have a much higher, near impossible threshold to meet and also raises concerns about the FCA’s consistency of approach for smaller sized firms.

#### *Practical application of the Public Interest Framework*

41. It would be inappropriate for the FCA to act as the sole arbiter of what the impact of an announcement would be on the relevant firm, without an evidential test and with only 10 business days for firms to make representations. Furthermore, the FCA’s assessment of these new factors will be inherently subjective and open to interpretation. Consequently, any challenge by a firm would likely be unsuccessful, given the lack of a transparent and clarificatory evidential test. This creates damaging uncertainty for the industry which again will impact UK competitiveness and growth prospects.

#### *The 10+2 day window*

42. The FCA proposes to extend the time allowed for firms to consider any draft FCA announcement to 10 business days’ and to make representations to it, with a further 2 business days after receiving the FCA’s final text prior to publication, believing this represents a concession to our previously expressed concerns. Whilst the shift from one day’s notice in the first consultation to ten days’ notice is an improvement, regulated and/or listed firms would still require an opportunity to engage authentically and fully with the FCA about the basis of the proposed disclosure – potentially a process akin to the existing draft Warning Notice process.
43. This should include the FCA providing written reasons supporting the disclosure, allowing for written representations and responses from firms and ensuring that appropriate governance, namely formal approval from the FCA/PRA’s Boards is in place before the FCA informs a firm of its intention to publish – only then should the ten-day notice period commence. This would then permit the firm adequate time to consider an application for an injunction. Additionally, the FCA should only make an announcement naming a regulated and/or listed firm where it can demonstrate that an anonymised disclosure is insufficient.

#### *Expanded public domain factor*

44. It appears that the scope of the public domain factor, (included in Part 1 of the consultation) requiring consideration of whether or not the information about an investigation is *already in the public domain* appears to have been expanded in the new proposals.
45. Previously the FCA indicated that it would only announce where there is either *public concern or speculation* about the information in the public domain. In the Part 2 consultation, an FCA announcement is justified simply by the fact that the information is

*already in the public domain.* We are concerned that this will provide sufficient justification for the FCA to announce in the majority of cases. Such an announcement, from the regulator, is likely to generate significantly more concern than when the firm initially disclosed the information. The FCA should recognise this and revoke its proposals.

#### *Sharing information with Parliament*

46. The FCA has also included a new factor about *information sharing with Parliament*. We consider this something of a distraction as, while Parliamentary scrutiny is a fundamental aspect of our democratic process, it should be conducted within the boundaries of existing legislation. Whilst reminding parliamentarians of this may occasionally be uncomfortable for public bodies, the existence of legislation such as the Financial Services and Markets Act 2000(FSMA), which restricts the extent to which financial services regulators may share confidential information about investigations, should not be overridden simply because MPs are inquiring about certain firms and their activities.

#### *Heightened CMC activity*

47. A risk which the FCA has not fully addressed in Part 2 is the scope for the announcement of an investigation to *trigger significant Claims Management Company (CMC) activity*. The FCA states in the revised CP that '*knowing that redress might be coming via an FCA investigation might dissuade consumers from signing up with claims management companies or law firms*'. Our members do not agree with this analysis based on their lived experience. We believe that any change to announcement practices should be accompanied by changes to the redress system - which the FCA is already considering separately in its Call for Input. Specifically, mechanisms should be introduced in DISP to enable firms to reject unsubstantiated complaints.
48. If these proposals are implemented and the key issues identified by us and other respondents to that Call for Input, naming a regulated and/or listed firm *could stimulate mass FOS cases* (and very significant fees for respondent firms), CMC litigation, Data Subject Access Requests (DSAR), and significant resulting costs not only for the firm in question but potentially for others of its peers providing the same product.
49. There seems to us to be a very serious disconnect between the FCA's proposals on enforcement (on the one hand) and (on the other hand) what our members are already experiencing by way of FOS referrals and would expect to experience even more of if the FCA's proposals on enforcement are implemented.
50. In general, vehicle finance members are variously facing very significant increases in FOS referrals (and in the numbers of speculative CMC instigated DSARs) relating to motor commissions and all types of members face overall significant increases in all types of FOS referrals, as CMC increase their activities ahead of FOS introducing limited charging of CMCs. This is leading to firms potentially incurring high levels of overall FOS costs and spending considerable time dealing with CMC instigated DSARs.

51. We note that the FOS proposes to increase the free case limit from three to ten per financial year for each CMC. The FOS say that this will mean that over 80% of the CMCs that currently refer cases to its service will not be in scope for a fee, and only the bigger firms will therefore be affected.
52. As the FCA will note from UK Finance's recent response to this Call for Input firms have significant concerns about regulatory requirements and expectations and FOS decisions being applied retrospectively and determinations of outcomes (such as for the Consumer Duty) being based on the standards at the time and without presumption that those standards apply retrospectively. As a general principle and as a matter of public law, enforcement of regulations and FOS decisions should be grounded on the underlying requirement being:
- a) clear to the firm at the time,
  - b) foreseeable (that is, they enable firms reasonably to understand the consequences of their actions at the time they are taken), and
  - c) predictable (that is, they enable firms reasonably to understand at the time what action they should take).

We consider that this is:

- a) vital to the fair treatment of firms (and thereby their investors) and managing the reasonable expectations of consumers, but
- b) likely completely subsumed in the noise of an announcement or not at all apparent to a consumer from a short FCA announcement

especially when combined with these proposals' adverse impact on the balance of (on the one hand) the FCA's powers and (on the other) the rights of regulated and/or listed firms, certainty and predictability, the rule of law, and the UK as a place to do business/invest in.

53. This will damage public confidence and trust in financial services and the effectiveness of its regulation and contribute to making the regulatory architecture in the UK unattractive to investors and to adversely affecting UK growth and competitiveness.

*Public Law remedies will be inadequate for firms*

54. Some may view the FCA's proposals as circumventing the intention, provisions and protections of existing financial services legislation relating to enforcement procedures and/or in breach of the FCA's obligations to act proportionately, with the risk that individual firms may be forced to challenge proposed announcements by the FCA on public/human rights grounds. Any such litigation risks damaging the standing of both the firm and the FCA, public confidence in financial services regulation and moving the relationship between regulator and regulated and/or listed onto a more litigious, confrontational basis, which would not be constructive.

## B. Alternative proposals

### *Flex the existing EG 6.1 'exceptional circumstances' test*

55. We reiterate that the existing exceptional circumstances test in EG6.1 provides sufficient flexibility for the FCA to make the '*incremental changes*' it is seeking without needing to replace it with the vague 'public interest' test.
56. The FCA's revised proposed approach now makes the distinction between the existing 'exceptional circumstances' test, pivoting to, in our view, a significantly lower threshold 'public interest' test. The FCA has indicated that the exceptional circumstances test has become unworkable. As stated above it is our view that the existing exceptional circumstances test in EG6.1 already enables the FCA to achieve its desired outcome of announcing investigations where it is in the public interest to do so.
57. Rather than pursuing its current proposals, we suggest that instead, the FCA works with industry to flesh out its understanding/definition of exceptional circumstances. These could be limited to emergency situations only. By way of example, exceptional circumstances could be regarded as arising where there is:
  - a) The risk of imminent acute harm to large segments / cohorts of the public
  - b) imminent impact to the integrity, working and confidence in the UK financial system.
  - c) Impact to parties with direct/indirect relationships, with the firm in question, including depositors, creditors and other stakeholders.
58. By definition, this would mean publication would not be anonymous as it would clearly be in public interest – and publication would need to define the situation in question.
59. In order to make the enforcement announcement process more robust, we suggest that, rather than an FCA ExCo Director making the decision to announce an enforcement investigation, such decision be submitted for approval to an independent panel, e.g. the Enforcement Decisions Committee (EDC). In this process, the EDC should also take into account the risk that the announcement in itself incentivises undue negative implications including third party claims before the full facts of the investigation are known.
60. Similarly, while anonymity of cases which touch on sensitive issues (e.g. AML, cybersecurity, wide-spread misconduct) is preferred over name-based announcements, we note that it will generally prove challenging to ensure anonymity. The announcement will likely trigger intense media interest with the foreseeable speculation and media investigation into which firm or firms are implicated, and perhaps Freedom of Information Act requests to the FCA to uncover the subject matter. This could have significant negative implications for the firm(s) in question which would not be able take the appropriate preparatory actions in a timely fashion.

61. The FCA names 'size of firm' as a determining factor in the decision-making process. This will likely create inconsistent decisions amongst the industry and create uncertainty. It would be unfair for instance to name a firm in an investigation into a possible infraction if the activity within that firm is relatively small and/or it concerns a very small number of clients; a market or depositor reaction could easily be disproportionate to the facts under investigation.

*Couple a flexed 'exceptional circumstances test with a focus on Anonymised Announcements*

62. We remain of the view that anonymised announcements would provide the FCA the educational and deterring misconduct benefits it is seeking to achieve and perhaps permit the FCA to provide more granularity than would otherwise be permissible with non-anonymised announcements. In our previous response we suggested a monthly or quarterly *Enforcement Watch* publication analogous to the FCA's existing Market Watch. So, we welcome the FCA's acceptance that this could be an avenue to explore. This publication could for example, present an anonymised summary of key areas of enforcement activity, including the number of new investigations initiated, the nature of the firm(s)/sectors involved and the type of issues under investigation.
63. The specimen case studies in the consultation demonstrate that announcements naming a firm will be too-high level to offer any educational value. The educational benefit will realistically come from Final Notices, *Enforcement Watch* type publications, updates on thematic reviews or other anonymised publications (all already within the FCA's existing capabilities) where the FCA can provide guidance and detailed analysis of failings/wrongdoings and any learnings for firms from an investigation.
64. Anonymous publication could be used in the majority of cases, not only for financial crime, systems & controls and fraud cases.

## E. Guardrails

65. As set out above, we disagree that a fundamental change in approach to the announcement of an investigation is needed. The revised proposals are disproportionate and fail to address risk of weakening UK competitiveness and inhibiting growth. They should be withdrawn.
66. If contrary to our submissions, the current proposal is taken forward as currently formulated regarding regulated and unlisted firms, there needs to be a clearly defined process around publication. This might include:

*Approval by an independent body*

- a) Prior to the FCA notifying a firm of its intention to make a public announcement, it should follow an appropriately robust governance process to determine whether an investigation meets the public interest test and be subject to an announcement. This should include engagement and written approval by the FCA board to ensure

independence, consistency of decision making, and appropriate balance of the FCA's range of objectives including growth. For PRA authorised firms there should be a hard coded obligation to meet with the board of the PRA and obtain express consent to announce, or as an alternative a committee made up of 3 directors to include at least one non-Enforcement Director.

#### *Engagement with Firm*

- b) Prior to the FCA finalising a decision to make a public announcement regarding an investigation subject, it should provide clear, written reasons to the firm explaining the basis for an intended disclosure and why the same outcome (as making a public announcement) could not be achieved using the 'exceptional circumstances' test or through anonymous disclosure. At the same time, the FCA should provide the draft wording of any proposed announcement for the firm to consider and respond to.
- c) An obligation is required from the FCA to engage authentically and allow firms an opportunity to provide full written representations, to which the FCA commits to respond. This obligation should be codified. We envisage a process akin to the existing draft Warning Notice process.

#### *Draft announcement wording*

- d) Once a decision is made to announce by the independent body, FCA should provide a final, updated version of the proposed announcement to the firm. A firm should, upon receipt of the wording of announcement, be provided with sufficient time of at least 14 working days to consider the wording and making an application for an injunction.

#### *Appeal*

- e) A firm should be allowed an opportunity to appeal the decision to the Regulatory Decision Committee prior to publication.

## F. Conclusion

- 67. Given the very significant reputational and financial damage that publication could cause our members, as well as its impacts on growth and competition of the UK, we strongly recommend that the revised policy should be abandoned. Further work should be undertaken to explore alternatives to address clearly defined needs around publication, for example, in relation to the unregulated sector. As regards regulated and/or firms, if a revised form of the proposal is to be taken forward at the very least additional cost benefit analysis and guardrails are required to provide greater certainty and clarity regarding how the power is used, including a requirement for full and detailed prior written submissions and appropriate governance as detailed in Section E.

Of course, UK Finance would be pleased to facilitate any further discussion with members on the issues we have raised in this response. We are content that the fact that UK Finance has responded to this consultation be published by the FCA on its website.

*Responsible Executive*

✉ [simon.hills@ukfinance.org.uk](mailto:simon.hills@ukfinance.org.uk)

☎ +44 (0) 7921 498183

## Appendix - Case studies

### *British Steel Pension Scheme*

68. We believe that by the time it had commenced investigations the FCA had already used its supervisory powers to prevent firms from providing further advice. Therefore, making an announcement identifying one or a subset of firms would not have enhanced consumer protection.
69. In our view this is a case, where a general announcement would have been more beneficial by raising public awareness overall. It would also have avoided creating the perception among consumers that firms not individually named were offering compliant advice.

### *Citigroup Global Markets Limited (“CGML”)*

70. As we understand it CGML promptly notified the market of the erroneous trade and the market quickly acknowledged this, fully expecting that the FCA would undertake an investigation to identify learnings for CGML and the market more broadly.
71. There was no widespread public concern about the incident, so we are unclear whether it would have been in the public interest for the FCA to announce the commencement of an investigation.

### *Pricewaterhouse Coopers LLP (“PwC”)*

72. At no point was there any suggestion that PwC was involved in the London Capital Finance (“LCF”) fraud, the investigation of which the FCA had already made public.
73. We do not believe that by announcing the commencement of an investigation into PwC the FCA would have helped victims of the LCF mini-bond fraud. Indeed, this may have led the public to erroneously conclude that PwC was somehow involved in the fraud which was not the case.
74. To the extent that PwC failed to fulfil its proper audit responsibilities we believe this investigation is more properly handled by the Financial Reporting Council, which did, in fact, make its investigation into PwC public. In our view this was sufficient.
75. We note that the FCA made comments comparing the powers of the FRC to its own, which is misguided. The FRC’s powers are discretionary and exercised by a Conduct Committee that only recommends publication of an investigation if certain conditions are met, such as if (i) such publication is necessary in all the circumstances and (ii) “any

*potential prejudice to the subject of an investigation is outweighed by the factors in favour of publication.”<sup>11</sup>*

76. There are also fundamental differences between the announcement of an investigation by the FRC into an audit, and the announcement of an investigation into a potential failure to notify the FCA of suspected fraudulent activity, with the latter requiring far more investigation and evidential groundwork. We refer to UK Finance’s response to the FCA’s Consultation Paper 24/2, Annex B, page 45 which includes a comparative analysis of other UK regulators, which differ in approach and largely do not publish details of investigations. In instances where regulators do, they oversee very different markets to the financial market, where there is little competition, and the potential impact is much less severe to UK growth, competition and market stability.

*CB Payments Limited (“CBPL”)*

77. We agree that a public announcement regarding CBPL could have been advantageous. However, to the extent that an FCA announcement of an investigation would have been about financial crime concerns this may not have provided reassurance to the public.

---

<sup>11</sup> FRC Publication Policy (Audit Enforcement Procedure) paragraphs 7, 10 to 14