



30 April 2024

***FIA and FIA EPTA Response to the FCA Consultation on FCA Enforcement Guide and publicizing enforcement investigations – a new approach***

The Futures Industry Association (FIA)<sup>1</sup> and The European Principal Traders Association (FIA EPTA)<sup>2</sup> welcomes the opportunity to respond to the FCA’s [public consultation](#) (CP24/2) which proposes changes to the FCA’s approach to investigations, including plans to publicly announce the opening of enforcement investigations, disclosing the identity of the subject of the investigation, and publishing updates throughout the investigation process, where the FCA considers this to be in the public interest.

FIA and FIA EPTA (‘The Associations’) members support the FCA’s objectives set out in the [FCA 3-year strategy 2022-2025](#) which aim to (i) reduce and prevent serious harm, (ii) protect the integrity of the UK financial system, and (iii) promote competition in the interest of consumers. The Associations welcome the FCA’s efforts to identify opportunities to adapt the UK regulatory system to further strengthen the attractiveness of UK capital markets.

Due to the complex nature of UK financial markets and its stakeholders, it is essential that regulation and regulatory oversight are proportionate and fit for purpose in order to facilitate orderly market conditions.

The Associations’ members are concerned that the FCA’s proposed approach set out in CP24/2 will be detrimental to the orderly functioning of UK capital markets with very limited value to the public interest.

The Associations strongly recommend the FCA reconsiders its proposed approach and contemplate alternative methods already available to the FCA to improve transparency and achieve its desired outcome. We are confident that the FCA’s objectives can be achieved through existing means which will allow for FCA to publish timely information about investigations in a robust and effective way in order to raise consumer awareness, maintain market confidence, educate the market and deter future misconduct.

Our response includes comments on several elements of the FCA’s proposals. These are addressed in the responses to the questions listed below.

---

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

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

**Question 1: Do you agree with our proposal to announce our investigations, including the names of the subjects, and publish updates on those investigations, when in the public interest? Please give reasons for your answer.**

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

This commitment on the part of the FCA is already achieved in a number of ways, including through publication of newsletters (for example, FCA Market Watch), Policy and Guidance documentation, final reports on Multi-firms Reviews, Thematic Reviews and through facilitating industry roundtables. Our members are concerned by the FCA’s proposed approach and its potential detrimental impact on UK capital markets and its participants. These concerns are set out below.

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

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

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

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

FCA has existing powers to make public announcements relating to investigations. Furthermore, the FCA acknowledges the prejudice and impact caused by such announcements. As such, the Associations’ members challenge the need for the new approach as detailed in CP24/2. As stated in 6.1.4 of the Enforcement Guide, the FCA believe that exceptional circumstances may arise where matters under investigation have become the subject of public concern, speculation or rumour. In this scenario, our members agree with the FCA that it may be desirable for the FCA to make public certain facts in order to allay concern or contain speculation or rumour.

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

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



We recommend the FCA exercises caution when drawing comparisons with other global regulatory authorities as set out in 2.18 of CP24/2 given that different market conditions, market expectations, legal systems and counterparty rights will apply in these jurisdictions. When considering the proposals in comparison to the approach of other global regulatory bodies, our analysis suggests that the proposal would make the FCA somewhat of an anomaly given that the majority of global regulators do not routinely make public announcements relating to investigations. FCA makes specific reference to the Monetary Authority of Singapore (“MAS) within the consultation paper. We understand that MAS has only announced two open investigations out of approximately 104 listed formal regulatory and enforcement actions in the last five years and these two investigations are joint investigations between MAS and the Singapore Police Force. As such, the MAS’ approach is therefore more in line with the FCA’s current approach of only announcing cases in “exceptional circumstances”, an approach which we consider should be continued.

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

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

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

#### The potential impact on UK markets and its participants

The impact of the outcome of a regulatory enforcement case can be multifaceted. In many cases, the reputational impact on a firm subject to an enforcement case outweighs the financial impact of a fine. The Associations’ members are concerned that the FCA’s proposal to publicly announce the opening of an enforcement investigation



and the identity of the subject of the investigation will result in the reputational damage against the subject, as well as frontrunning the investigation process and its findings. Our members share the view that this negative reputational impact, at the outset of an investigation, is unjustified given the infancy of the investigation, its limited details and lack of findings at the time of the announcement.

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

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

Publicly identifying the subject of an investigation will result in undesired impacts on the financial market. The lack of concrete findings and evidence upon opening an investigation will mean that an announcement from the FCA is likely to increase speculation in the market, creating disorder for the entity and potentially other firms in the sector. An announcement by the FCA may be the catalyst for clients moving trading accounts away and/or diverting investment from a firm. Credit lines and funding may also be switched off as the market attempts to make risk-based decisions and the entity listed cited with the announcement seeks to address client and counterparty queries on the severity and nature of the investigation. Similarly, firms may be subject to clauses that treat the commencement of an investigation as an event of default or, at the very least, a disclosure event, to the extent that the investigation is considered 'public'. We are concerned that a public announcement upon commencing an investigation against an entity may create early trigger points under these contractual provisions which is undesirable from a systemic perspective. It is our shared belief that the impact and potential consequences come too early in the investigation process and encourage FCA to work on balancing its desire for transparency alongside ensuring the fair and orderly functioning of markets.

As set out in CP24/2, the FCA's proposals may impact beyond UK financial markets. This is especially significant in the scenario where the FCA publicly identifies a branch or affiliate, located in the UK and regulated by the FCA, with headquarters based in another jurisdiction. Heightened scrutiny and speculation caused by identifying a firm upon opening an investigation may result in questions being raised to the FCA by non-UK regulatory authorities seeking to gain insight into the investigation in order to assess whether similar deficiencies exist in their home markets. Furthermore, publicly identifying an entity upon opening an investigation may hinder an existing investigation in another jurisdiction where enforcement cases are bound by professional secrecy and presumption of innocence obligations until the investigation process is concluded. Given limited details upon opening an investigation, we are concerned that early identification of entities subject to an investigation may create unnecessary regulatory scrutiny of unassociated activities.



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

#### Alternative solutions to achieving FCA objectives

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

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

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

We remain concerned by the lack of evidence or supporting data necessary to justify the proposals. We recommend that the FCA conducts a thorough investigation of all existing options readily available to achieve its desired outcome. Upon review, members share the view that the FCA's ability to educate and deter certain market practices are best achieved through the anonymity provided by existing market publications.

**Question 2: Do you agree with the structure and content of our proposed new public interest framework, including the factors proposed, and the other features of our proposed new policy described in paragraphs 3.5 to 3.12 above? Please give reasons for your answer if you do not agree.**

**FIA/FIA EPTA response:** The Associations' members are concerned that the new public interest framework, as set out in the consultation paper, does not consider the wider implications of announcing that an investigation has commenced and disclosing the identity of the subject under investigation. While we support efforts to protect consumers and maintain confidence in UK financial markets, we feel it is essential that the FCA consider the proposed new approach from the perspective of all stakeholders in financial markets.

Upon review of the public interest framework, set out in 3.5, members share the view that this framework is best suited when investigating and deterring behaviours which specifically target consumers, for example, a Ponzi scheme or other 'get rich quick' investment scams, but we do not agree with the structure and content when



determining if an announcement is required across retail and wholesale markets. Considering each factor within the framework:

*Enable the interests of potentially affected customers, or consumers or investors more generally, to be protected.*

- While supportive of this objective, we argue that the decision should consider the interests of all stakeholders. Given that the majority of investigations are concluded with no further action taken, this outcome, following public announcements from the FCA will confuse consumers and lead to further scrutiny of the FCA's investigation process.

*Help our investigation, for example by encouraging potential witnesses or whistleblowers to come forward.*

- This exists within the current version of the Enforcement Guide. Furthermore, most FCA investigations will be internal to authorised firms, meaning that the FCA has access to any witness to whom it may wish to speak to. If the FCA feels there are deficiencies in escalation from whistleblowers or witnesses, FCA may consider similar action to the US Department of Justice's pilot program to incentivise whistleblowers and/or witnesses by financially rewarding leads.

*Address public concern or speculation, including by correcting information already in the public domain.*

- As outlined above, announcing that a firm is under investigation is likely to create further speculation and market disorder.

*Provide reassurance that we are taking appropriate action.*

- This can be achieved through communication methods already at the FCA's disposal.

*Deter future breaches of our rules or other requirements or prohibitions that we are responsible for enforcing.*

- This is inconsistent with the idea that the fact of an investigation does not imply any finding of wrongdoing. Retaining anonymity allows for greater flexibility on details of concerns and findings that FCA can publish to the industry, which would otherwise likely be constrained by the confidentiality provisions in FSMA or the need to protect the integrity of the investigation if the firm is named. Publishing anonymized but more detailed updates would provide firms with the ability to benchmark and test internal systems, controls and processes in line with the FCA's findings and recommendations. Disclosing the identity of the firm being investigated provides no additional benefits and would limit the FCA's ability to educate and update the market.

*Otherwise advance one or more of our statutory objectives, including protecting and enhancing the integrity of the UK financial system.*

- As noted, an announcement will result in undesired impacts on the financial market. The lack of concrete findings and evidence upon opening an investigation will mean that an announcement from the FCA is likely to increase speculation in the market, creating disorder for the entity and potentially other firms in the sector.

As explained in our feedback to Question 1, the reputational damage suffered by the entity or group named in the announcement may impact the wider financial services sector. This would ultimately be harmful to consumers and deliver an outcome exactly the opposite of what FCA is setting out to achieve.



Due to limited details, evidence and findings that are available upon opening an investigation, the complexity pertaining to investigations, the time required to carry out an investigation and the fact that the majority of investigations result in no further action being taken, we question whether the proposed naming of regulated entities is truly in the public interest.

The Associations' members are also concerned by the lack of safeguards to ensure a measured and consistent determination is made across cases as to whether an announcement falls within the public interest framework set out in paragraph 3.5. Upon opening an investigation and considering whether to issue a public announcement, the FCA will have limited insight into whether such an announcement is likely to have an adverse impact on:

- the conduct of FCA's investigation or an investigation by another regulatory body or law enforcement agency
- the interests of consumers, or
- the stability of the UK financial system or our ability to otherwise carry out FCA's statutory functions.

We are alarmed by the FCA's admission in 3.8 that the potential impact on firms subject to investigation has not been included as a specified factor in FCA's proposed framework. We encourage the FCA to reconsider this approach when designing its framework together with undertaking a proper cost-benefit analysis, which is a necessary tool to assist healthy, evidence-led policymaking. The proposals allow for the FCA's subjective opinion to play too prominent a role, with limited safeguards for industry participants, when determining what is in the public interest and the likely consequences of an announcement. It is not in the public interest or in the interest of UK financial markets to ignore the potential impact on firms in an effort to achieve transparency objectives, which can be achieved otherwise.

We also note that the decision to publish a warning notice is made by the Regulatory Decisions Committee (RDC) and the subject has the opportunity to make representations to the RDC about the decision. Given the similarities between warning notices and the FCA's proposals, we are surprised that, in contrast, the FCA does not propose an equivalent process relating to the decision on whether to publish an announcement relating to an investigation. This increases the risk that the relevant decision-maker within the FCA misapplies the framework and publishes incorrectly. It also denies the firm the opportunity to argue its case against publication.

In all likelihood, when considering the FCA's proposed framework, one can imagine that the FCA's ability to perform effective and efficient investigations may be hampered as industry participants challenge the actions and decisions via judicial review by questioning the statutory powers and justification that form the basis of the proposals. This action will expose the FCA to the jurisdiction of the courts not only for judicial review but also for injunctions seeking to halt an announcement. Similarly, where applicable, a firm may take the decision to issue an announcement refuting the FCA's claims. This may hamper the investigation process, create confusion and undesirable market conditions for consumers and, ultimately, counteract the FCA's stated objectives.

**Question 4: Do you agree with the proposed content of our announcements? Please give reasons for your answer if you do not agree.**

**FIA/FIA EPTA response:** We strongly disagree with the proposed content of the FCA's announcements and encourage the FCA to reconsider its position in the interest of consumers, investors and market participants. As set out in our answer to Question 1 above, we consider it extremely difficult to justify the necessity of the new approach set out within the consultation when compared with the powers already within the FCA's remit and set out within the existing Enforcement Guide.

To reiterate a concern made above which specifically relates to the proposed content of an announcement, at the time of opening an investigation, the FCA will have limited details, lack any concrete evidence and will have no findings on which to base making the announcement. Any limitations or gaps in the summary of the suspected breach, failing or other misconduct being investigated will only serve to heighten speculation in the market, which risks creating disorderly market conditions for all stakeholders, including consumers and investors.

Furthermore, FCA's approach seems to contradict a fundamental principle of our justice system, whereby an individual or firm is innocent until proven otherwise. Irrespective of the FCA's efforts to contain the impact through disclaimers set out within the announcement, this will be of little benefit to the entity subject to the investigation. This concern is exacerbated by our understanding that approximately 65% of investigations end with no further action being taken. Even if the FCA succeeds in its stated aim of reducing this percentage, it is likely that at least 50% of cases will continue to be closed with no finding. Subjecting firms to reputational damage at the outset of an investigation for years does not appear to align with the objectives of a financial market regulator. We ask that the FCA reconsider and revise its approach.

The FCA should bear in mind that announcing regulatory investigations against a firm will be picked up by aggregators and service providers as an 'enforcement hit' against the subject. Information concerning the investigation will appear on searches conducted by regulated firms across global markets as they perform customer due diligence and KYC checks. This may result in subjects of investigations having difficulties in establishing relationships and doing business with other regulated financial institutions, since investigations would result in a risk flag for AML purposes.

Compounding matters, in the UK, the Proceeds of Crime Act 2002 requires firms in the regulated sector (which include all FCA-regulated firms and other sectors such as accountancy firms, law firms and estate agents) to give notice to the National Crime Agency (NCA) if they suspect that another person is in possession of 'criminal property'. NCA consent is required to do business or transactions with such persons. 'Criminal property' is a broad definition for these purposes, including any proceed from crime, and the trigger for NCA notice or consent is low. There is no exception from NCA reporting for public domain information, nor for matters already under investigation by the authorities such as the FCA. This means that when investigations are announced, the NCA is typically inundated with low-value reports, describing some relationship that in-scope firms have with the investigation subject, with a reference to investigations whose existence is already in the public domain.





To reduce the risk of the FCA's publicity of enforcement or investigation cases triggering unwanted volumes of low-value suspicious activity reports and stifling business in case NCA consents are required, the FCA should consider, as a matter of its pro forma notices, to state wording such as the following (except in cases where it would be inappropriate to do so): 'This notice should not be taken by any person as grounds for knowledge, notice or suspicion of any criminal activity nor that any person is in possession of any criminal property.'

This issue should also be taken into account more generally by the FCA, in the context of it deciding whether or not notices naming investigation suspects are in the public interest.

**Question 5: Do you agree with our proposed methods of publicizing an announcement and updates? Please give reasons for your answer if you do not agree.**

**FIA/FIA EPTA response:** As noted, FCA has set out guidance within the existing Enforcement Guide to make a public announcement, in exceptional circumstances, where the announcement is desirable to:

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

Furthermore, the Guide states that when determining whether such announcement is appropriate, the FCA 'cannot publish information if publication of it would, in its opinion, be unfair to the person with respect to whom the action was taken (or was proposed to be taken)'.

While having no immediate feedback on the proposal to publish announcements through existing channels, for example via the FCA website, issuing firms subject to an investigation with one business day's notice is of significant concern. Having one business day's notice severely limits any recourse available to the entity and permits little opportunity for the firm to inform senior management and prepare for the inevitable deluge of enquiries from clients, counterparties and media. Disclaimers contained within the announcement will do little to reduce concern and speculation.

Similarly, one business day notice gives firms little time to draw to the FCA's attention factors which may weigh against publication under the public interest framework, such as potential impact on consumers particular to the relevant business which the FCA may not have considered.

As noted above, alternative solutions are available to meet the same end goal. Market Watch publications, Peer Reviews, Multi-firm Reviews, Thematic Reviews and Dear CEO letters are capable of achieving transparency while acting in the public interest and demonstrating FCA's commitment to (i) reduce and prevent serious harm, (ii) protect the integrity of the UK financial system, and (iii) promote competition and in the interests of consumers as set out in the FCA's 3-year strategic plan. Disclosing the identity of a firm is of no added value and may restrict the FCA's ability to educate and deter the market.

**Question 6: Do you agree with our proposed approach to publicizing investigation updates, outcomes and closures? Please give reasons for your answer if you do not agree.**

**FIA/FIA EPTA response:** Approximately 65% of FCA investigations result in no further action. Increasing the frequency of public announcements relating to investigations is likely to be scrutinized if this statistic does not change. As a result, the Associations' members are concerned that the FCA's proposal to publicise investigations may impact the integrity of the investigation process.

Investigations may be active for years. We are interested to understand how the FCA plans to improve the pace of investigations by announcing investigations and publicising investigation updates without impacting the integrity and pace of the investigation process.

Information contained within Decision Notices and Final Notices upon closure of an investigation are a useful resource for firms when calibrating surveillance systems and benchmarking internal systems and controls, training and governance frameworks against the FCA's findings and expectations. The value of this information is not enhanced by disclosing the subject of the investigation at the outset nor providing investigation updates (as these updates are unlikely to be substantive without impacting the integrity of the investigation process).

**Question 8: Do you have any comments on the revised content of chapters 1-6 of EG?**

**FIA/FIA EPTA response:** For transparency, background and ease of reference, we argue that these provisions should be retained and remain within the EG rather than being relocated elsewhere. Such provisions within the EG provide helpful descriptive colour/context on powers/remedies which may be exercised by FCA. For example, the FCA's test describing when it would seek to apply to a court for an injunction in market abuse cases.

**Question 16: Do you have any comments on our proposed approach to future consultation?**

**FIA/FIA EPTA response:** We support transparency and open dialogue with regulators and policymakers. As such, we believe that it is in the best interest of markets, market participants, investors, consumers and the public for the FCA to continue to consult when making any changes to the Enforcement Guidance. As noted by the FCA itself, this has generally been its approach historically and we argue that this is of particular importance in light of the proposals set out in CP24/2 which would create a seismic shift in the FCA's approach to enforcement.