
Consultation Response

FCA CP24/2 'Our Enforcement Guide and Publicising Enforcement Investigations – a New Approach'

30 April 2024

The Association for Financial Markets in Europe (AFME) and the International Swaps and Derivatives Association (ISDA) welcome the opportunity to comment on **FCA CP24/2 'OUR ENFORCEMENT GUIDE AND PUBLICISING ENFORCEMENT INVESTIGATIONS – A NEW APPROACH'**.

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.

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.

Our members do not agree with the FCA's proposals in relation to publicising the commencement of investigations. Members have several concerns:

- There are significant concerns about the proposed public interest test, including in particular the apparent failure to acknowledge the impact of publication on the investigation subject as a relevant factor and the vague, overly broad, nature of the criteria proposed.
- The proposals appear to significantly underestimate the adverse impact that publication will have on firms and the wider market, and the potential for confusion and misunderstandings as a result of early publicity. This is particularly so given that the FCA's proposed approach is not taken by any other comparable financial services regulator. The FCA cites the position of the Monetary Authority of Singapore, but its practice is to provide minimal information about individual investigations on a very infrequent basis (largely where there is a strong public interest in disclosure and where the FCA would already be able to publicise the commencement of the investigation under its existing policy). The FCA also cites Ofcom and Ofgem, but Ofgem does not generally publish details of the commencement of its REMIT investigations and the approach of both Ofcom and Ofgem to publicity in other contexts are under review. Further, both Ofgem and Ofcom are very different regulators, supervising and exercising powers over very different markets in which far fewer market participants operate. Their role and approach is not comparable to that of the FCA.
- The stated aims and benefits of the proposals could substantially be achieved within the FCA's existing policy framework.
- The legal basis of the FCA's proposed new framework is, at best, unclear.

Association for Financial Markets in Europe

London Office: Level 10, 20 Churchill Place, London E14 5HJ, United Kingdom T: +44 (0)20 3828 2700

Brussels Office: Rue de la Loi 82, 1040 Brussels, Belgium T: +32 (0)2 883 5540

Frankfurt Office: WorkRepublic, Zeil 127, 60313 Frankfurt am Main, Germany T: +49 (0)69 710 456 660

www.afme.eu

Flaws in the proposed public interest framework

- 1 We consider that the public interest framework proposed by the FCA is vague and overly broad. Whilst we understand the factors set out, they leave the reader none the wiser as to how the discretion will in fact be applied in practice. Whilst the FCA has said that there will be no presumption of publicity, the factors that would lead to a decision to publish in one case rather than another are not clear. At a minimum, we consider that the FCA should consult further, using worked examples to give an indication of the cases that would likely remain confidential and those where it considers the public interest test would support some form of publicity. This could, for example, be achieved by reference to historic enforcement outcomes (without explicitly / implicitly identifying the firms in question), and/or by highlighting the sorts of cases that would have led to early announcement and those that would not, as well as the broad nature / content of the disclosure and the stage of the investigation at which the public notification would have been made.
- 2 In addition, the FCA's failure to include the impact of publication on the subject as one of the identified factors is, in our view unjustifiable and inappropriate. It is also potentially inconsistent with the FCA's obligations as a public body. We do not consider it is adequate simply to have a catch all reference to "taking all relevant facts and circumstances into account". The impact of publication on the firm is obviously a material factor which should be considered in all cases.

Failure to acknowledge the potential adverse consequences of publication

- 3 Members are of the strong view that the consultation does not adequately acknowledge the significant adverse consequences that early publicity in relation to FCA investigations could have. This is important in assessing whether publicity on the basis proposed by the FCA is appropriate and whether alternatives should be used to advance the transparency aims set out in the CP. The potential adverse consequences include the following:
 - 3.1 Risk of misunderstanding: There is a real risk that the fact that an investigation has been opened into a firm will be interpreted by the public as a strong indicator of culpability, regardless of any FCA explanatory statement or disclaimer that no findings have yet been made. Consumers may well fail to understand the distinction between the commencement of an investigation and a finding of breach and could make decisions (e.g. changing service provider, seeking to exit investments) which lead to them incurring unnecessary costs/risks or suffering other harms. This risk will be exacerbated by press reporting which will lead inevitably to further speculation about the investigation and its potential consequences, and this could in turn lead to significant reputational and financial harm on the firms impacted. The risk is even greater in a society with 24-hour news cycles and where social media can swiftly spread misinformation and rumour about the conduct that may or may not have prompted the investigation. The FCA has not cited any evidence to support its apparent view that consumers in general will be able to understand the nuances here and does not appear to have taken any account of the risk of consumers suffering harm as a result of making decisions based on an inaccurate understanding of the position. The FCA appears not to have conducted any consumer testing to inform its understanding about how consumers would understand and react to announcements. We are curious to understand whether the FCA would be prepared to test and provide evidence supporting customers' understanding of the text of their proposed

announcements here, to the same standard that firms subject to the consumer duty are required to test their own communications to retail customers.

This is a particular concern given the high proportion of investigations (currently over 60%) that currently end with no further action taken. Even under the FCA's new approach to case opening, there should always be a significant number that upon investigation lead to closure without further action.

We also note that, in practice, there will generally be much more media attention paid to announcements of investigations being opened compared to announcements of investigation closures. Furthermore, the wording of closure notifications may not totally 'exonerate' firms (e.g., wording along the lines of 'we found insufficient evidence to proceed with our investigation' or 'we did not consider the conduct to be sufficiently serious to merit an enforcement outcome'), creating the impression that misconduct or regulatory non-compliance was identified but just not thought to be sufficiently serious or extensive, rather than that no misconduct was identified.

- 3.2 Risk of damage to shareholder value: This speculation and confusion could then lead to significant and unwarranted damage to shareholder value. In some circumstances, an announcement could undermine the safety and soundness of a firm or create financial stability risks more broadly.

This risk is not theoretical – there are a number of examples where misunderstandings about FCA action has led to market disruption and loss of market value. For example, the share price of several insurers fell significantly following the publication of a news item in March 2014 indicating that the FCA intended to investigate 30 million closed book insurance policies. More recently, banks offering motor finance policies faced a reduction in share price following the FCA's announcement in January that it intended to investigate this activity. This was felt acutely by smaller lenders with a significant exposure to this type of lending, causing one to decide not to pay a dividend. This impact was felt despite the fact that in neither case had a formal enforcement investigation been launched, suggesting that an announcement of formal proceedings as proposed would have the same, if not more significant, impact. Publication in these circumstances could actually lead to the FCA's own actions undermining its statutory objectives (e.g. in relation to market integrity, consumer protection).

It would be wholly unfair and inappropriate for firms to suffer adverse impacts (loss of shareholder value, loss of client/consumer confidence) as a result of an announcement of an investigation which ultimately leads to no action being taken. The potential for such adverse impacts are even greater for small / medium sized financial institutions. Whilst larger firms might be able to withstand a (hopefully temporary) drop in consumer confidence, this may not be possible for smaller financial services firms who may not be able to recover from a significant drop in customer confidence. Subsequent vindication and an announcement that the FCA has closed its investigation without taking action will be of no comfort if the firm has already collapsed. These concerns are exacerbated in circumstances where investigations take many years to conclude.

- 3.3 Risk to competitiveness: The UK competes with several other major financial centres as a location for financial firms, and the FCA has undertaken extensive work in recent years to seek to strengthen the UK's position in global markets, including its review of the Listing Regime and proposals for a new public offer and admission to trading regime. Work to strengthen the UK's position in global wholesale markets has been identified as a key strategic priority for the FCA in its 2024/25 business plan. Given that no other major global financial services regulator

approaches publicity in relation to the commencement of investigations in a manner similar to the FCA's proposals, there is a real risk that the FCA's proposed approach will reduce the attractiveness of the UK as a financial centre and undermining the competitiveness of the UK economy.

- 3.4 Risk of unfair treatment: Related changes to the FCA's position in relation to the opening of investigations may lead to the FCA opening fewer investigations on a more strategic basis, e.g. selecting just one or two firms as a representative sample where several firms may have been engaging in the same conduct. It would be unfair and potentially misleading for one or two regulated firms to face being named at the outset of an investigation simply because they were selected as one of the representative sample, at a point when the FCA will necessarily not have had a complete understanding of the facts and circumstances. This approach could also lead to unintended consequences in terms of consumer behaviour. For example, consumers might avoid taking products from firms that are under investigation, choosing instead to interact with contemporaries who may in fact be known by the FCA to be engaging in the same conduct but who were not selected as part of the representative sample.
- 3.5 Risk that disclosure will lead to further confusion as a result of the need for the subject to respond publicly: It is inevitable that firms will feel it necessary to respond publicly to the commencement of an investigation. Depending on the circumstances, this could lead to divergent views being expressed by the firm regarding whether any breaches have arisen and what the consequences of the investigation are. This risks serving only to create further confusion and uncertainty for consumers and the market, potentially over a protracted period whilst the investigation is conducted. Further, public disagreement of this type could undermine public confidence in the FCA or the UK financial system more generally.
- 3.6 Impact of publicity on conduct of investigation: There is a risk that early publicity will have a detrimental impact on the future conduct of an investigation – specifically a risk that the FCA will feel more compelled to build a case to justify the investigation it has already publicly announced – even more so if that publicity had an adverse financial or reputational impact on the firm. Similarly early publicity (and the provision of public updates on an ongoing basis) will be a distraction from dealing with the substance of the investigation itself. It might also lead to less constructive engagement from the investigation subject, which may feel that, having suffered the adverse publicity of an investigation being announced, there are fewer benefits to early resolution of an investigation through the settlement process and more reasons to fight the negative publicity by defending itself publicly as well. The early publicity may also lead to increased scrutiny and questions about the FCA's efficiency in conducting its investigations in a way which could be unhelpful and could again undermine public confidence in the UK financial system more generally. As the FCA will know, there can often be a mismatch between public/media/consumer expectations in relation to whether wrongdoing has occurred and what a thorough investigation identifies – there is a risk of this mismatch only increasing as a result of early publicity in relation to investigations. These factors may all in turn lead to delays in the progression of the FCA's investigation caseload. We strongly disagree that transparency is necessary or appropriate to increase the speed or accountability with which the FCA progresses its investigations – the FCA's governance and oversight structures should be adequate to achieve this.
- 3.7 Impact on firms' business relationships and dealings with other regulators/public bodies: Firms frequently have to make disclosures to other regulators / public bodies or in response to due diligence / RFPs from clients/counterparties about the existence of ongoing regulatory

investigations. At present, firms are able to rely on the confidentiality of ongoing investigations as a reason for not providing these details. Once an investigation is made public by the FCA, firms face being drawn into protracted requests for additional information – in many cases information that the firm will be unable to provide at the outset of an investigation, the nature and outcome of which may not be known. This is particularly the case with respect to firms whose headquarters are in other jurisdictions or where the investigation has a cross-border element, where these announcements could result in the premature triggering of a notification requirement with other international regulators that would not ordinarily be required. In addition, this could lead to firms being offboarded or being denied the ability to undertake business activities or services, for example because counterparties are unwilling to do business with them because of the announcement of an investigation into financial crime systems and controls. Such consequences could in turn have prudential impacts for individual firms and could also undermine public confidence, as well as the attractiveness of the UK. ESG ratings providers may treat the existence of an investigation as a “controversy”, with lower ratings potentially increasing the cost of funding for the investigation subject.

3.8 Increased risk of litigation / third party claims: Early disclosure of the existence of an investigation could also lead to requests for pre-action disclosure or threatened claims by claimant law firms. The costs of responding to such requests and managing such risks could be very significant and challenging to manage whilst an investigation is ongoing, particularly given the potential overlaps in witness evidence and the risk of inconsistent findings. Further, as has recently been seen in relation to the Woodford Equity Income Fund, the involvement of claimant law firms can lead to consumers receiving less redress than they would have done had they just allowed the investigation process to reach a conclusion and redress outcome.

3.9 Risk of identifying potentially accountable individuals: Whilst the FCA has said that it will not normally publicise the commencement of an investigation into individuals, the SMCR and information available via the FCA register and through public sources means that it will be often be easy for the media to identify which Senior Manager(s) have accountability for the area in relation to which the breaches are suspected to have occurred, and/or some sales and trading staff. This will inevitably lead to speculation about whether Senior Managers are under investigation by the FCA and, even if they are not, what action the firm is taking in relation to the individuals in question. Any announcement in relation to a named firm risks triggering follow on questions to the firm and or to the FCA about the position in relation to easily identifiable individuals.

4 All of these risks are exacerbated by the proposal to only give firms 24 hours’ notice that an investigation is going to be announced. We discuss this aspect further in our response to Question 5.

5 We do not consider that these are risks that firms already face. In our experience, listed firms only publicly announce the commencement of an investigation in a minority of cases. Disclosures in the context of financial statements or prospectuses tend to be made at a much later stage and/or in generalised terms.

6 We also note that these adverse consequences align closely with the reasons that the FCA itself has cited in support of its current approach. For example, the FCA’s website currently states as follows:¹

“...we don’t usually make public the fact that we’re investigating (or have investigated) a firm or individual. This is partly to protect the effectiveness of our investigation, and partly because announcing an FCA investigation can damage reputations.”

¹ [Information we can share | FCA](#)

If we can't say we're investigating someone, we also can't say we're not. Therefore, the right answer in such cases is: 'We can neither confirm nor deny'."

7 This is in line with the approach first proposed by the FSA in 1998, in anticipation of the Financial Services and Markets Act 2000 being passed and coming into force. In CP17 (December 1998), the FSA said *"We propose that, as a general policy, the FSA will not make public the fact that it is (or is not) investigating a particular matter. Publication of the fact that an investigation has been commenced by the FSA may prompt unwarranted public concern about the matters and persons within the scope of an investigation. It may put consumers' funds at risk or do unwarranted damage to the reputation of firms, issuers or individuals involved"*.

8 The FSA made similar comments in 2008 in DP08/3, noting that:

"significant procedural safeguards were specifically built into FSMA in order to prevent the casual, rash or unchallenged use by the regulator of public statements that could damage a financial services firm's reputation and commercial standing. This in turn reflected the lengthy discussion and debate in Parliament during the drafting and passage of FSMA on the balance between the regulator's enforcement and other powers and the rights of the regulated... In considering whether and how to disclose more, one important test will be whether it helps consumers become more financially capable. Consumers are most likely to benefit from further disclosure which helps them in choosing products and staying informed of financial matters. Consumers may also gain confidence through greater regulatory disclosure by acquiring a better understanding of our role in consumer protection. Set against these benefits is the potential harm of too much information or information taken out of context. The financial services industry is vulnerable to these risks because of the perceived complexity of many financial products, and low levels of financial capability... Some information may even inhibit financial capability. This problem may arise where the information is a low priority for consumers, where the white noise of less relevant information may crowd out the more significant information. Poor data quality, information which is difficult to compare across the market, or highly relevant information that is hard to understand, can all inhibit financially sound decision making... There are several significant issues and competing priorities regarding the use of publicity in the enforcement context, particularly where investigations or proceedings are ongoing and there has been no determination of culpability. A balance needs to be struck between various factors, including:

- the relevant statutory limits on what we can say;*
- the potential benefits that could flow from greater publicity of enforcement investigations by demonstrating to the market our concerns about certain areas or conduct, better informing consumers and deterring bad practice;*
- the scope for publicity to hamper or prejudice investigations and enforcement action or, alternatively, to assist in bringing forward witnesses; and*
- concerns about the fairness of publicity by us – and, potentially, consequential media attention – potentially prejudicing those who are the subject of an investigation where the case is ongoing.*

9 We consider that these concerns are equally relevant today as they were in 1999 and 2008.

10 Finally, we note the recent letter from the House of Lords Financial Services Regulation Committee, which echoes many of these concerns.²

² <https://committees.parliament.uk/publications/44344/documents/220473/default/>

The FCA's proposals are not necessary in order to achieve the FCA's objectives

- 11 The FCA states that its aims are to give earlier insights to consumers and firms about FCA areas of concern, promote market confidence by showing that action is being taken, deter misconduct, educating others and provide accountability in relation to the FCA's work. We consider that each of these objectives can be achieved by the FCA providing additional details about its portfolio of Enforcement activity on a more frequent but aggregated and anonymised basis. Such an approach would also avoid the damaging consequences outlined above which arise from taking a named approach.
- 12 This could be done by providing, for example, a monthly or quarterly summary of key areas of Enforcement activity – e.g. the number of new investigations commenced/closed, the nature of the firms/sectors involved, the broad issues which are being investigated, etc. The MAS, cited by the FCA in the consultation paper, takes a similar approach with its periodic Enforcement Bulletin. Care would of course need to be taken to ensure that the details provided do not enable a reader to deduce the identity of the investigation subject or lead to inappropriate media speculation.
- 13 Providing information on an anonymised / aggregated basis would avoid the harms noted above, and would indeed make it easier for the FCA to provide more useful/detailed information to the market without breaching s.348 FSMA, which would therefore mean that the information has greater educational benefit. Firms can use this information to assess their own business models, policies and practices.
- 14 We recognise that there may be some circumstances (widespread public speculation / the need to identify witnesses in relation to a very particular firm-specific matter/ etc) where disclosure on a non-anonymised basis may be appropriate, but this can be dealt with on a case by case basis – indeed, the existing approach to publicising investigations already contemplates disclosure in such circumstances. We would observe also that it may in some circumstances be possible to encourage witnesses, or whistleblowers to come forward to assist the FCA's enforcement work without stating that an investigation has been opened into a particular firm – for example, the FCA could announce that it is reviewing a particular issue and invite the provision of information relevant to that topic. Responding individuals could be made aware subsequently that information provided could be utilised in the context of enforcement as well as supervisory activity. Further, we note that the FCA has broad powers to obtain evidence from third parties for the purposes of an investigation, and the consultation cites no data to support the contention that a publicity power is necessary to identify or procure evidence that the FCA has otherwise been unable to obtain.
- 15 Members are strongly of the view that the approach we have set out above is preferable to what has been proposed by the FCA in the consultation. We would also note that the FCA's proposals in relation to transparency coincide with a number of other changes to the FCA's enforcement strategy. There is a strong argument for taking an incremental approach here, and assessing whether earlier, aggregated reporting without naming firms is supporting the objectives set out by the FCA, before evaluating whether any incremental benefits of naming a firm outweigh the potentially significant risks.

Legal basis of the FCA proposals

- 16 The Financial Services and Markets Act 2000 contains a detailed legislative framework which addresses publicity in relation to the FCA's enforcement activity. Section 391 FSMA creates a specific statutory framework for the publication of warning notice statements, decision notices and final notices. There is no provision empowering the FCA, on a statutory basis, to disclose the commencement of an FCA

investigation – in contrast to the CMA, which is specifically empowered to disclose the commencement of investigations by s25A of the Competition Act 1998. Even with this statutory power, the CMA's practice is to give minimal public information about its investigations.

- 17 Further, section 348 of the Financial Services and Markets Act 2000 prohibits the FCA from making public “confidential information” (which includes information relating to the business or affairs of another person received by the FCA for the purposes of or in discharge of its statutory function). The FCA has historically cited section 348 FSMA 2000 as precluding it from commenting on new or ongoing investigations³
- 18 The FCA has indicated that it now believes it can lawfully publicise new and ongoing investigations. The CP does not explain the reasons why the FCA has now changed its assessment (notwithstanding the statutory confidentiality restrictions to which it is subject).
- 19 Whilst there are various gateways permitting the disclosure of confidential information by the FCA, the CP gives no explanation of which gateways the FCA considers permit disclosure in the form proposed. The “self-help” gateway permits the FCA to disclose information for the purposes of enabling or assisting the FCA to discharge its public functions, but as the FSA itself noted in 2008 (DP08/3) *“the mere fact that a disclosure is relevant to or in line with our functions will not, of itself, be sufficient to satisfy the requirement...The disclosure must be able to be reasonably presumed to make a material contribution to the discharge of that [public] function”*. Given the significant change in approach, members consider that it is incumbent on the FCA to articulate with specificity the circumstances in which it considers the test set out above will be satisfied. Whilst the CP references the FCA’s statutory objectives, the relevant test here is whether the disclosure enables or assists the discharge of a specific public function performed by the FCA.
- 20 We would also note that there may be unintended consequences from the FCA’s change in approach. If the FCA considers that the self-help gateway permits disclosure on the basis contemplated, it will be much harder for the FCA then to argue that section 348 prevents disclosure of other confidential information in other contexts – e.g. the provision of confidential information arising out of the FCA’s supervisory activities to the Treasury Select Committee⁴.

Question 3: Do you agree with our approach to announcements and updates where the subject is an individual? Please give reasons for your answer if you do not agree.

- 21 We agree that the FCA should not publicise the fact that it has opened an investigation into a named individual. We also note the points made at 3.9 above regarding the risk of identifying individuals even where an announcement relates to a firm.
- 22 We note that at §4.1.5(2) of the proposed new Enforcement Guide, the FCA indicates that it may publish an announcement and updates about an investigation into an individual if it considers that it is in the public interest to do so and the announcement and updates can be given without breaching data protection legislation and other applicable statutory restrictions. It is not clear from either the consultation paper or the Enforcement Guide in what circumstances these criteria would be fulfilled. For example, we do not consider that a generalised desire on the FCA’s part to be transparent / accountable to Parliament would provide an adequate basis for disclosure. We consider the FCA should

³ June 2014: Response to TSC re request for certain legal opinions and agreements between the FCA and banks relating to the FCA’s review of interest rate hedging products (IHRPs) ;February 2018: Response to TSC re publication of s. 166 report into RBS treatment of small and medium-sized enterprise customers; October 2017: FOI request on RBS s. 155 report referred to above (see p. 6 onwards on application of s. 348); June 2019: FOIA Decision Notice re ARROW programme

⁴ *ibid*

provide examples to clarify the circumstances in which it considers that an announcement of an investigation into an individual could lawfully be made on a named basis.

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

- 23 For the reasons set out in our response to Questions 1 and 2, we do not agree that the subject of the investigation should be identified in any announcement, nor should information be given that allows the subject of the investigation to be deduced.
- 24 It is very unclear from the consultation paper what level of detail would be included in an announcement about the nature of the breach or other misconduct being investigated. It would be useful for the FCA to provide illustrative examples, so that firms can understand how the FCA plans to strike a balance between, on the one hand, providing sufficient information about a new investigation to educate / inform firms and, on the other hand, avoid releasing information which could prejudice the interests of the investigation subject or the conduct of the investigation or otherwise breach the requirements of s.348 FSMA. As noted above, we are unsure whether the FCA would be able to provide meaningful information early in an investigation, sufficient to address its 'education' and 'deterrent' objectives.

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

- 25 The FCA's proposals to give one business day's notice of the FCA's intention to announce an investigation is unworkable. Specifically:
- 25.1 The timeline allows no meaningful opportunity for the firm to engage with the FCA about the proposal to make an announcement, including to make representations about the appropriateness of any announcement and/or to make representations in relation to the content of the announcement (e.g. correcting factual errors, identifying any confidential information, ensuring that the announcement is appropriately balanced). Further, we would expect to see a framework governing engagement with the FCA on these announcements set out clearly in EG, so that parties can be confident of a fair opportunity to respond to the proposal to announce at a macro level and that they will have a separate opportunity to deal with the specifics of the proposed text if the FCA decides to go ahead. We would draw the FCA's attention to its framework for engaging with the subject of a warning notice when it considers it appropriate to publish a warning notice statement (set out in DEPP 3) as an example here.
- 25.2 The timeline allows no time for the firm to prepare appropriately for the consequences of any announcement. For example, a firm will need to inform internal stakeholders, engage communications / PR advisers, develop its own communications, consider whether it needs to inform other regulators, anticipate and plan its own response to questions from / engagement with other stakeholders (e.g. clients, counterparties, shareholders, etc). For medium/larger sized firms, this will generally involve briefing a far larger group than would typically be involved in handling / responding to an investigation.
- 25.3 Firms with global operations which are part of a group with an international footprint will need to manage this process across multiple jurisdictions and time zones.

- 26 The consultation does not make it clear in what circumstances the FCA would regard it as necessary to announce an investigation without notice. We consider that this would only be appropriate in wholly exceptional circumstances and consider the FCA should articulate examples of what these might be.
- 27 We consider that the FCA should generally provide at least 14 days' notice of any intended announcement. Such an approach would be consistent with the notice period generally given in relation to Warning Notice statements under s387 FSMA.
- 28 The FCA's proposals in relation to listed companies require further exploration and clarification. The assessment of whether the commencement of an investigation is inside information requiring disclosure to the market is the responsibility of the issuer, not the FCA. If the firm has decided that a market disclosure is required at the commencement of an investigation (which in our members' experience only takes place in a small minority of cases), it will normally be necessary to announce the investigation as soon as possible after it has commenced / the firm has received a notice of appointment of investigators. If the firm has decided that no inside information has arisen, it is not clear on what basis the FCA would regard it as inappropriate to give the listed firm no notice of intended publication until markets have closed.
- 29 The consultation paper does not indicate who will make the decision to announce an investigation within the FCA. Given the potential negative consequences for firms listed at 1.8 above, it is important that the decision to publish is given sufficient senior-level consideration, and that the firm has an opportunity to make representations to the decision-maker before a final decision is made.
- 30 The consultation states that the FCA will normally publish announcements and updates on its website, but also states that it "may" issue a press release. It is not clear in what circumstances the FCA would issue a press release. Would this be on every occasion, or only in some circumstances? If the latter, what would be the factors that made a press release appropriate in some cases and not in others?
- 31 Further:
- 31.1 Members would welcome clarification from the FCA as to whether the FCA envisages an announcement being made at or around the same time as a notice of appointment of investigators is issued, or at some later stage (e.g. after a scoping meeting has taken place);
- 31.2 The FCA has not explained why it regards it as appropriate to apply its new policy to investigations that are already open. It is inappropriate for changes of this nature to be applied on a retrospective basis. It is also unclear when decisions about publicity would be made in relation to historic cases, and how these would be announced (e.g. does the FCA envisage a mass release of information about existing cases when the new policy comes into force, and how the notice / consultation process will work in this context).

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

- 32 The consultation paper does not explain in what circumstances the FCA would issue an update and what level of detail would be contained. For example, the CMA's updates tend to be very generic and/or procedural (e.g. "additional time required").
- 33 Members consider that the FCA should provide examples of the expected nature and content of update announcements and when they would be used (e.g. periodic reporting on all cases or only where particular circumstances (which should be specified) justify an update in relation to a particular case).

34 Members also consider that it would be important that the FCA ensures that publicity in relation to the closure of an investigation has the same prominence / format as in relation to the opening of an investigation – e.g. a press release should be issued if a press release was used when announcing the commencement of the investigation.

Question 7: Do you agree with our proposal that moving our strategic policy information to the website will make information more accessible? Please give reasons if you do not agree.

35 We agree that moving strategic policy information to the FCA’s website has the potential to make this information more accessible, both for firms and for consumers. It would be helpful to understand more about how and where this information will be presented on the FCA’s website.

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

36 Members do not have detailed comments on EG, but would like to understand whether the revisions made are seeking to memorialise / reflect existing practices (e.g. the disuse of private warnings, mediation, the approach to the attendance of firm counsel at interviews with employees, the treatment of firm commissioned reports), or whether the FCA is intending to signal a change in approach. If it is the latter, we consider that these changes should be articulated more specifically to the market so that firms can consider what is being contemplated and make appropriate representations.

Question 9: Are there any chapters set out in paragraph 4.17 that you consider should be kept in full as part of EG?

Question 10: Are there any chapters that you consider should be relocated elsewhere?

Question 11: Are there any chapters that you consider can be deleted altogether?

Question 12: Do you agree that the present chapter 8 of EG should be moved from EG and included in SUP 6? Please give reasons if you do not agree.

37 AFME and ISDA members have no specific points to make in relation to these questions.

Question 13: Do you agree with the removal of the restitution chapter from EG? Please give reasons if you do not agree.

38 The FCA has signalled its intention to make greater use of its supervisory intervention and restitution / redress powers. Members have no particular objection to guidance in relation to these matters being included in SUP rather than EG, but the consultation currently contains no information about what would be included in SUP or even when a consultation on the relevant Handbook text would take place.

Similarly, whilst the FCA has indicated its intention to consult on additional guidance relating to redress, there is no clarity about when this will take place or when the guidance will be finalised.

- 39 Given the significant impact the exercise of these powers can have on a firm, members would welcome sight of the proposed SUP handbook text and early clarity regarding the timing of the FCA's redress/restitution guidance.

Question 14: Do you have any comments on our proposal to retain EG 19 and 20?

- 40 Members have no comments on this proposal.

Question 15: Do you agree that we should not use private warnings as an alternative to taking formal action and remove any reference to them from EG?

- 41 We agree that it is unnecessary to treat private warnings as a form of disciplinary sanction. Our understanding is that the FCA has already stopped using private warnings as a sanction, and we agree with the removal of the guidance on private warnings from EG. For the avoidance of doubt, members agree that the FCA can and should continue to provide feedback to a firm about potential lessons learned / areas for enhancement when closing an investigation without action.

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

- 42 Members have concerns about this approach. Whilst we can appreciate that non-substantive/administrative changes to EG should not require consultation, we consider that substantive changes to EG should be the subject of consultation. The consultation process will help raise awareness of the changes, but will also enable firms to engage with the FCA and provide feedback/ highlight areas where greater clarity would be beneficial. More generally, ceasing to consult seems inconsistent with the FCA's stated objective of increasing transparency.

About the Associations

AFME represents a broad array of European and global participants in the wholesale financial markets. Its members comprise pan-EU and global banks as well as key regional banks, brokers, law firms, investors and other financial market participants. We advocate stable, competitive, sustainable European financial markets that support economic growth and benefit society.

AFME is the European member of the Global Financial Markets Association (GFMA) a global alliance with the Securities Industry and Financial Markets Association (SIFMA) in the US, and the Asia Securities Industry and Financial Markets Association (ASIFMA) in Asia.

AFME is registered on the EU Transparency Register, registration number 65110063986-76.

Since 1985, ISDA has worked to make the global derivatives markets safer and more efficient. Today, ISDA has over 1,000 member institutions from 77 countries. These members comprise a broad range of derivatives market participants, including corporations, investment managers, government and supranational entities, insurance companies, energy and commodities firms, and international and regional banks. In addition to market participants, members also include key components of the derivatives market infrastructure, such as exchanges, intermediaries, clearing houses and repositories, as well as law firms, accounting firms and other service providers. Information about ISDA and its activities is available on the Association's website: www.isda.org. Follow us on [X](#), [LinkedIn](#), [Facebook](#) and [YouTube](#).

AFME Contacts

Louise Rodger
Managing Director, Compliance, Control and Accounting
louise.rodger@afme.eu
+44 (0)20 3828 2742

Fiona Willis
Associate Director
fiona.willis@afme.eu
+44 (0)20 3828 2739

ISDA Contact

Fiona Taylor
Head of UK Public Policy
ftaylor@isda.org
+44 (0)20 3808 9707