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Enforcement Law and Policy
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By email only to: cp24-2@fca.org.uk

Our reference RTC/CAC/NKP/BMP

Your reference CP24/2

30 April 2024

Dear FCA

Response to Consultation Paper CP24/2

1. Introduction

1.1 This is a response to *Consultation Paper CP 24/2: Our Enforcement Guide and publicising enforcement investigations – a new approach* (**CP24/2**) by Osborne Clarke LLP (**Osborne Clarke**) (the **Response**). References in the form "[x.x]" in this response are references to the paragraphs of CP24/2.

1.2 We consent to the publication of Osborne Clarke's name as a respondent to CP24/2.

1.3 We are aware from the numerous public statements made since CP24/2 was published that many authorised firms, industry bodies, and professional firms intend to respond to CP24/2.

1.4 In particular, we note the letter of Lord Forsythe of Drumlean, chair of the House of Lords Financial Services Regulation Committee (**FSRC**) dated 18 April 2024[1]. We share and adopt the concerns of the FSRC and a number of those concerns are expressed in this Response. We note the response issued by the FCA on 25 April 2024, but consider that it only amplifies the conclusion set out in this Response: that a re-consultation is required. Indeed, the examples of public announcements already made only serve to underline why the current proposal is unnecessary – the FCA already has the ability to make announcements and achieve its objectives under the existing regime, but subject to appropriate safeguards which are not contained in the current proposals.

[1] Published on 22 April 2024 at https://committees.parliament.uk/publications/44344/documents/220473/default/

1.5 That response raises additional concerns: not least that the FCA views its proposals as merely a "*move away from a presumption against disclosure"*. That is not the current standard: currently disclosure will only be made in *exceptional* circumstances, which is a significantly higher standard than a mere presumption of non-disclosure. To the extent that the FCA's response contains new information, it is concerning that some of the response appears to be either a shift away from the position set out in CP24/2, and it is not clear why that information (and the full extent of the FCA's analysis, thinking, or data) was not included in CP24/2 so that it could be fully considered and responded to in an appropriate manner, rather than being released very late on in the consultation. Indeed, the FCA's proposal to "*explain more* [its] *thinking*" on the cost-benefit of these proposals, rather than to conduct such an analysis, is inadequate and to only set out those thoughts in a consultation response (rather than reconsulting) is not appropriate. The full analysis undertaken by the FCA to date should form part of a consultation paper, so that it can be subject to appropriate consultation. We address the FCA's position on other UK regulators at section 2(A) below, where, for the reasons expressed, we do not consider that the FCA is comparing like-for-like.

1.6 In short, we consider that the FCA's response only amplifies the need for a re-consultation. The FSRC has requested that the FCA does not take further steps to implement the proposed changes until the FSRC has had an opportunity to take evidence on these issues. We would support that delay, and invite the FCA to re-consult once it has carried out the research and cost-benefit and comparative analysis referred to in the FSRC's letter, and taken into account the other matters raised in this Response and the other industry responses which are, no doubt, being prepared.

1.7 Osborne Clarke is responding independently to CP24/2 because, in addition to the decades of contentious financial regulation experience in our team, our client base gives us a specific insight into a sector of the financial services market that stands to be disproportionately affected by the implementation of the proposals set out in CP24/2. In particular, we consider these proposals are likely to impact challenger banks, fintechs, and other disrupter firms, particularly in the payments space. We are keen to share that viewpoint alongside our 'on the ground' knowledge and experience as to that impact in practice and the real risk of unintended consequences.

1.8 Osborne Clarke has a well-established contentious financial regulatory practice, with a breadth and depth of experience in acting for both financial institutions and individuals in the financial services sector in relation to investigations and enforcement action by the FCA and other similar bodies, including the Serious Fraud Office, the Financial Reporting Council and the Institute of Chartered Accountants in England and Wales. We have handled complex and high-stakes regulatory investigations and enforcement actions for clients across various sectors, including major banks, investment managers, and financial services providers; and provided comprehensive advice on regulatory investigations, potential claims, insurance matters, and UK financial regulatory issues.

1.9 Whilst we have a long track record in acting for more traditional financial services clients, as a firm, Osborne Clarke also has a particular focus on digital business and fintech. We act for clients on mis-selling redress programmes and claims, affordability and Consumer Credit Act (**CCA**) compliance complaints, section 140 unfair relationship claims, regulatory investigations, cyber security issues, and data compromises.

1.10 In 2023, Osborne Clarke was appointed to the Financial Services Compensation Scheme (**FSCS)** panel for core legal services until 2026. Given FSCS's role in compensating consumers who have been impacted by the collapse of authorised firm, our work and relationship with FSCS has provided Osborne Clarke with specific insight into the potential for firms to fall into insolvency as a result of the implementation of the proposed changes.

1.11 We welcome the chance to comment on the CP24/2. We believe it could have a significant negative impact for all of our clients and for the financial services industry as whole. However,

in making these comments, we are not acting in a representative capacity for any of our clients, or any other person.

2. **Response to Consultation**

2.1 We have set out our responses to the specific questions below. However, in summary:

(a) We do not consider the proposals to be necessary or proportionate to achieve the stated objectives, nor that there is a cogent, data-driven, evidence base as to how the proposals would achieve the hoped-for benefits.

(b) We consider the negative consequences could be substantial, and it is concerning that no cost-benefit analysis or other process to take those into account has been conducted.

(c) We consider that the FCA should not pursue these proposals; the FCA already has sufficient alternative options to achieve the objectives of CP24/2 without the increased risk of harm to firms and market stability.

(d) However, if the FCA is determined to adopt some form of implementation:

(i) it should undertake a proper cost-benefit assessment, taking into account a number of factors which have not been considered in CP24/2. In particular, the impact on the subjects of any announcement (the **Subject**) and the statutory protections afforded to the Subject in relation to other public announcements; and/or

(ii) it should consider, and consult on, other more proportionate proposals. We strongly oppose the publication of the name of the Subject, or any information which could lead to that entity (or any persons within that entity) being identifiable. The FCA should, at the least, consider how its objectives could be achieved safely on an anonymised basis.

(e) The FCA should reconsult on its proposals as regards the streamlining of the Enforcement Guide. The FCA's current explanations for the proposed changes are not sufficient (and provide no explanation at all for the removal of some key procedural safeguards). The risk of unfairness to those being investigated outweighs any potential benefits of efficiency to 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.

2.2 Whilst we agree that the FCA can, and should, in exceptional circumstances, make announcements in relation to on-going investigations, we do not agree with the wider proposals set out in CP24/2. We do not agree that announcements should be made at the start of an investigation, nor that the naming of the Subject is necessary save in very limited circumstances.

(A) Avoidance of statutory checks and balances

2.3 The new approach will apply to all investigations commenced by way of statutory appointment of investigators under the Financial Services and Markets Act 2000 (**FSMA**) or otherwise (per [3.2]).

2.4 The threshold for the FCA to appoint investigators under ss. 167 and 168 FSMA is low:

(a) Under s. 167: "*If it appears to* [the FCA] *that there is good reason for doing so*".

(b) Under s. 168: "*if it appears to* [the FCA] *that there are circumstances suggesting"* an offence has been committed / a requirement has been breached.

2.5 This means that an investigation can, and often is, commenced on the basis of limited information, potentially before the FCA exercises its information gathering powers under s. 165. Of course, the information gathering powers under ss. 171-172 can only be exercised once an investigator has been appointed. Almost by definition, the purpose of appointing an investigator is to investigate: to obtain information, consider it, and determine whether there has been sufficient wrongdoing to warrant the submission of an investigation report to the Regulatory Decisions Committee (the **RDC**) with a recommendation for regulator action.

2.6 The FCA is therefore proposing making an announcement at the start of the investigation: before obtaining evidence; and before the firm in question has had any opportunity to respond to, explain, or contextualise the information the FCA has obtained. It is not clear what benefit an announcement in those circumstances would achieve (as we address further in section 2(C) below): it certainly risks significant harm to the Subject.

2.7 Despite the FCA's proposed 'health-warning' of no finding of wrong-doing, the announcement is likely to be received by the public and the market akin to a censure (see section 2(D) below). Indeed, for comparison purposes, we note that a formal censure under s. 205 FSMA would only be made where:

(a) the FCA has made a determination that the firm has contravened a relevant requirement; and

(b) under s. 207 FSMA it has given the firm a warning notice setting out the proposed terms of the statement (with the right for the firm to refer the matter to the Tribunal).

2.8 CP24/2 makes clear that the proposed announcements would occur in circumstances where the FCA would not have made such a determination, nor would it have given the Subject a material opportunity[2] to respond to (or refer) the announcement.

2.9 The FCA has provided no explanation as to why it would be appropriate to circumvent the clear intention of Parliament by adopting the proposal set out in CP24/2. The new approach will allow the FCA to circumvent the detailed statutory process set out in Part 26 FSMA: the FCA is required to give firms a warning notice and a decision notice before making a public statement in relation to the contravention of a requirement.

2.10 Under s. 391(6) FSMA, the FCA may not publish information if, in its opinion, the publication would be "*unfair to the person with respect to whom the action was taken (or was proposed to be taken)".* CP24/2 makes clear that such considerations of fairness to the Subject of the announcement would *not* be taken into consideration – only public interest factors.

2.11 The FCA seeks to justify its proposed approach by suggesting that other UK regulatory authorities make announcements about their investigations. Indeed, we note that, in response to the concerns raised by the FSRC, the FCA specifically relied on that justification in its comments to the press.[3] We do not consider that these examples are appropriate comparators.[4] We also note that Annex 2 to the FCA's formal response to the FSRC it provided a table purporting to set out the justification for comparison with those other regulators. We do not agree that those justifications are appropriate. We have not addressed all of the other enforcement bodies here, but make the general preliminary observation that ultimately, either, those

[2] We address the fairness of the one business-day notice period, below.
[3] https://www.ftadviser.com/regulation/2024/04/22/lords-ask-fca-to-pause-name-and-shame-proposals/
[4] Not least because the Competition and Markets Authority (the **CMA**) has an express statutory power to make announcements, under section 25B Competition Act 1998, which the FCA does not.

regulators have a statutory basis for making announcements (which the FCA does not in the circumstances under consideration), or the circumstances in which other regulatory bodies announce investigations are materially different to the situation which would lead to an announcement being made under the proposals.

2.12 For example, the Ofcom enforcement guidance[5] (the **Ofcom Guidance**) states that when it "*open*[s] *an investigation, we will typically publicise it on the Ofcom website*" (at para. 4.26). However, it is clear that what Ofcom regards as "*opening an investigation*" occurs at a different, and more advanced stage than for the FCA. In this way, Ofcom and the FCA are not direct equivalents and so Ofcom serves as no precedent for this proposal's efficacy and fairness in practice.

2.13 To be clear, the Ofcom Guidance sets out a number of preliminary steps to opening an investigation which the FCA is not required to undertake, including:

(a) An assessment of whether an investigation would be likely to produce good outcomes for consumers, a balancing exercise of whether "*conducting an investigation against the resources required, and the comparative benefits of using those resources in other ways*" (para 3.3).

(b) An initial assessment of whether (i) the case is an administrative priority for Ofcom; and (in our view critically), whether (iii) "*the evidence we have justifies opening an investigation, having considered all relevant factors*" (paras. 3.9 – 3.23), including:

(i) Where appropriate, giving the subject "*the opportunity to comment on the relevant issue(s) and to provide information to assist us in deciding whether to open an investigation*" (para 3.12) and/or meet with the subject to discuss the complaint (para 3.16);

(ii) Considering whether the scale of the potential consumer harm is too low to merit the resource required to investigate (para 3.14);

(iii) Utilise statutory information gathering powers, informal requests for information, and/or consumer research, mystery shopping, or detailed analysis of complaints (paras 3.17 – 3.19).

2.14 In short, there is a more formal process which Ofcom engages in, including dialogue with the subject of a complaint, before an investigation is commenced, and thus before any announcement is made. These are important procedural safeguards. None of these steps are proposed in CP24/2. We, therefore, do not consider that it represents an appropriate comparison for the FCA's current proposals.

2.15 The Ofgem position is similar. In its own enforcement guidelines[6] (the **Ofgem Guidance**) we note that similar considerations are present. For example, (in each case a reference to a page or paragraph of the Ofgem Guidance, emphasis added):

(a) "*Our enforcement processes seek to ensure parties under investigation are treated fairly and appropriately and that we are accountable for the decisions we take **and make public***" (para 1.11).

(b) Ofgem will conduct an initial enquiry phase before deciding to open an investigation including, seeking information (para 5.2), discussing the complaint with the subject (para 5.3), and considering whether an investigation is appropriate (paras. 5.7 – 5.25).

[5] Ofcom, *Regulatory Enforcement Guidelines for Investigations – Guidelines* /https://www.ofcom.org.uk/__data/assets/pdf_file/0029/249095/enforcement-guidelines.pdf
[6] https://www.ofgem.gov.uk/sites/default/files/2023-03/Enforcement%20Guidelines%20v11%20March%202023.pdf

2.16 Only after these preliminary steps and safeguards have been observed would a decision be made to commence enforcement action and to publish the fact that it is doing so – a clear divergence again from the process which the FCA has set out in CP24/2. When announcing its investigation, Ofgem exclude information from publication if it "*might seriously harm the interests of the business under investigation"* and "*when deciding whether **to offer anonymity** to any business under investigation"* (emphasis added) (para 5.35). Again, for these reasons we do not consider this to be an appropriate comparator to the FCA's current proposals.

(B) Not necessary or proportionate

2.17 CP24/2 does not establish that it is necessary for the FCA to take the steps proposed in the CP24/2 to achieve its statutory objectives or the specific objectives set out in CP24/2, or that it is proportionate for the FCA to take these steps to achieve them, given the existing powers the FCA has and / or the possibility of other, less onerous, proposals being adopted instead.

(a) **Necessity**: CP24/2 does not explain why there are no other options available to the FCA to address the specific objectives set out in CP24/2. Indeed, CP24/2 ignores the reality that the FCA already has the powers and tools to achieve substantially the specific objectives stated in CP24/2. We address these objectives further in section 3 below.

(b) **Proportionality**: CP24/2 does not explain why the proposals are an appropriate means to achieve the stated objectives. CP24/2 does not explain what other, less burdensome, means to achieve those objectives have been considered, or why they are not appropriate to meet the stated objectives.

Notwithstanding that proportionality is a fundamental regulatory principle under which the FCA must operate (see, in particular, s. 3B(1)(b) FSMA), at [3.8] it is expressly stated that the FCA has not considered the impact of the proposals on Subjects. No cost-benefit exercise has been conducted. No weighing of the potential (but unmeasured) benefits of the proposals, against the clear and significant risk of harm to the Subjects of any announcements, market stability, and to the UK's international competitiveness as a market for financial services.

Our view is that there is a **substantial and significant** material risk that the proposals could actually work to undermine the specific objectives set out in CP24/2. There is material risk that early announcements could:

(i) **Undermine or reduce customer and investor confidence** (both the Subject and the wider market in which it operates);

(ii) **Undermine or reduce co-operation** between firms and the FCA in relation to supervision, reporting, and investigations;

(iii) **Impact on senior individuals** who may be implicated in any investigations announced by the FCA (notwithstanding the proposals set out in [3.13] – [3.18] of CP24/2);

(iv) **Cause significant reputational and financial harm** to the Subject, risking not just temporary financial loss, but insolvency, leading to the risk of a wider impact on market stability;

(v) **Undermine the competitiveness of the UK market for financial services**. CP24/2 is correct that *some* other jurisdictions adopt early announcements, but notably, some of the UK's major competitors in the financial services sectors – including the United States and the European market – do not; and

(vi) Indeed, adopting these proposals could make the UK **a less attractive forum for investment** and/or potentially undermine the relationship of comity with international regulators if early announcements risk undermining their own (confidential) investigations.

(c) **Retrospectivity**: At [3.2] CP24/2 indicates that the new approach will apply to "*all our investigations* […] *including those that are ongoing when we introduce our new policy*". We consider the retrospective implementation of this new approach to be unfair and contrary to the basic principles of natural justice. The firms who are currently being investigated by the FCA will have engaged with that process on the expectation of the investigation remaining confidential until the investigation is concluded, and that it will benefit from the statutory protections in FSMA and the procedure set out in the FCA's Enforcement Guide. Adopting the new approach to those investigations will lead to a clear and obvious risk of unfairness to those firms.

(C) FCA's stated objectives

2.18 CP24/2 asserts that it is seeking to achieve a number of objectives by these proposals, implying that a slew of benefits could flow. By way of summary only, the FCA's stated objectives appear to be categorised as follows:

(a) Protect the interests of potentially affected customers, or consumers or investors more generally, to be protected (see, e.g., [1.3], [2.11], and [3.5] (the **Consumer Objective**));

(b) Increasing the deterrence factor of is enforcement activity (see, e.g., the Foreword, [1.1], and [2.11 – 2.12] (the **Deterrence Objective**));

(c) Educating the market through the "*faster dissemination of best practices and concerns*" [1.4] so that other firms "*learn lessons, raise their standards and think twice… at a much earlier stage than currently*" [Foreword] on the basis that by the time an investigation is concluded the impact in "*significantly reduced*" [2.11-2.12] (the **Education Objective**));

(d) Building market confidence / trust in the financial system by "*increase*[ing] *market confidence and so enhance*[ing] *the stability and integrity of the UK's financial system* (see, e.g., the Foreword, [1.1] and [2.21] (the "**Confidence Objective**")); and

(e) Building trust in and accountability over the FCA's processes by letting consumers know the FCA is 'on the case' [Foreword] and "*reassures the public we are taking appropriate and prompt action*" [1.1] "*by shining a light on the efficiency and pace of our investigations*" [Foreword] and avoiding the "[p]*ublic concern about whether we are taking appropriate steps* […] *develop*[ing] *in this gap*" between identifying harm and the end of an investigation [1.3] (the "**FCA Objective**").

(f) Encouraging whistleblowers to come forward before it is too late to inform the FCA's work (see, e.g., [1.1] and [2.12]) (the "**Whistleblower Objective**").

2.19 CP24/2 fails to demonstrate that the proposals are an appropriate way to achieve these objectives.

(a) First and foremost, CP24/2 does not suggest that there is any existing causative link between these objectives and transparency in relation to the FCA's investigations. There is no evidence to suggest:

(i) These objectives are currently not being achieved because of a lack of publicly available information about investigations and enforcement action; or

(ii) That introducing these proposals would allow the FCA to achieve these objectives, or how material an impact they would have on the FCA's ability to achieve these objectives.

CP24/2 expresses belief that the proposals will further these objectives: it does not set out any evidence to support this view (whether in the form of market research or otherwise) and it does not set out any explanation of how those objectives would be achieved.

(b) Second, as noted above, these assertions are unsupported by any cogent argument that they are necessary (in that no other proposal than earlier announcements could achieve those objectives) or that they are proportionate (in that no other proposal than one which set out the Subject name and a summary of the specific facts under investigation could achieve those objectives).

2.20 Having considered the FCA's stated objectives, we consider that there is a material risk that the proposals would cause more detriment than benefit to a number of those objectives. Indeed, it is likely that at least some of these objectives will be undermined by the proposals.

(1) Consumer Objective:

2.21 Consumer protection is a core operational objective for the FCA, and it is right that it should be at the heart of its rule-making and enforcement processes. The FCA should, of course, do what it can to redress any harm caused to consumers through regulatory misconduct, and take steps to mitigate against consumer harm arising.

2.22 However, it is not clear what the proposed announcements would materially do to achieve that objective. Whether or not any harm has been caused by a regulatory breach will not be known until the investigation has been completed: whether similar harm can be avoided in the future will depend on the reasons for the breach. To use the simple, well publicised examples of the recent past: was it that the product was inherently unsuitable for all consumers; was it a product suitable for some consumers that was being missold to other consumers; was the product suitable and properly sold to those consumers, but there were hidden commissions; or was it an isolated instance of a particular team within an financial institution operating fraudulently? All of those scenarios are very different – merely announcing an investigation into a particular product sold by a particular financial institution may lead to no changes.

2.23 It is conceivable that consumers may stop buying that product altogether, from the Subject or its competitors, choosing less suitable alternatives. If the investigations ultimately results in no further action (as nearly two-thirds of investigations do), that could lead to consumer harm, rather than help.

(2) Deterrence / Education Objectives:

2.24 It is not clear how these objectives could be achieved by the proposals.

2.25 If the FCA makes an announcement before the conclusion of its investigation (and potentially before taking any steps to investigate), it will not have knowledge of all of the facts and circumstances: it may not have received the Subject's version of events, or had the opportunity to review any documents disclosed by the Subject, or spoken to appropriate witnesses.

2.26 Such an announcement would amount to no more than a general, unspecified concern about a particular practice or product. It is not clear what other firms could be expected to learn, or what steps they would be expected to take in order to raise their standards (or discontinue any unlawful or inappropriate activities), in those circumstances, that they would not obtain from warnings which are already given by the FCA.

2.27 The FCA already informs the market that it considers certain products or practices to be unsuitable, or to raise concerns about compliance in certain sectors of the market with particular rules, and does so on a regular basis, without the need to specifically refer to firms under investigation by name. To use recent examples - the FCA's warning on cryptoassets financial promotions[7], or the FCA's use of Dear CEO letters to highlight AML shortcomings[8]. In neither case was reference made to specific enforcement activity, nor was any specific firm 'named-and-shamed'. Nonetheless, we are aware from the work that we are doing with our own clients that these publications had a significant impact.

2.28 If the FCA considers that there is specific consumer harm occurring, or which could occur, such that the FCA considers it necessary to intervene and make the name of a particular firm public, due to urgency (and it has not been able to commence, or complete, any investigation) the FCA already has the power (and, indeed, the obligation) to publish supervisory notices under section 391(5) FSMA. The effect of that supervisory notice will take place immediately (achieving any necessary consumer protection / prevention of consumer harm objective) and may be made without notice to the firm, but allowing the relevant firm 28 days to refer the notice to the Upper Tribunal. That 'appeal' process will not be open to a Subject under the current proposal.

(3) Confidence Objective:

2.29 CP24/2 hypothesises that low consumer confidence in the UK financial markets arises, in part, because of a lack of transparency around the FCA's enforcement action. No data is provided to support that assertion, or quantify the potential impact of that specific factor, as against other market factors which may lead to confidence in the UK financial markets being undermined.

2.30 It is correct that more people lack confidence in the UK financial market that have confidence in it. In its Financial Lives Survey[9], published in July 2023, the FCA reported that in May 2022, only 41% of adults had confidence in the UK financial services industry. We would note that that figure appears favourable when compared, for example, to the UK Media (19%), the UK Government (27%), or even local Government (34%), when assessed using a similar 0-10 scale[10].

2.31 The Financial Lives Survey did not ask consumers why they had / did not have confidence: there is no indication that lack of transparency around FCA enforcement action was a major, or even material factor.[11] In the past year, the FCA has more than once indicated that the introduction of the Consumer Duty would be a significant remedy to these issues.[12] The implementation of the Consumer Duty may have a significantly more material impact on consumer confidence and/or may render the need for the proposals in CP24/2 otiose. However, the Consumer Duty has only been in force for less than a year, and for which the potential positive impacts on consumer confidence may not yet have had time to embed.

2.32 As it stands, there is no data-driven evidence on what most causes low consumer confidence, and there is no basis to conclude that a lack of transparency about the FCA's enforcement process is a cause, let alone a material cause, of that lack of trust. Consequently, there is

[7] https://www.fca.org.uk/news/statements/common-issues-crypto-marketing
[8] https://www.fca.org.uk/publication/correspondence/dear-ceo-letter-action-response-common-control-failings-anti-money-laundering-frameworks.pdf
[9] https://www.fca.org.uk/publications/financial-lives/financial-lives-survey-2022-key-findings
[10] https://www.ons.gov.uk/peoplepopulationandcommunity/wellbeing/bulletins/trustingovernmentuk/2023
[11] For comparison only we note that a survey was conducted by FSCS in 2022 which did address consumer trust and confidence in the UK financial services industry. That survey noted that the top concerns were fraud (53%), handling of personal data (43%), lack of consumer protection 'if things go wrong' (42%), firms entering into insolvency (40%), and bad customer service (40%). 'Lack of consequences for poor business practices', which may most closely be equated to the FCA's current objective, only came in 8th (35%). When considering 'Drivers of Trust' there were a number of potential issues which would improve trust: none of them were about transparency of FCA enforcement activity.
[12] For example, a speech in November 2023 indicated that the lack of consumer confidence expressed in the Financial Lives Survey was linked to poor customer complaints handling: https://www.fca.org.uk/news/speeches/consumer-duty-not-once-and-done#:~:text=20%25%20of%20those%20with%20low,the%20UK%20financial%20services%20industry.

nothing to suggest that the proposal in CP24/2 would materially improve that confidence compared to other measures.

2.33 By contrast, in our view, there is a substantial risk that early announcements could undermine the stated Confidence Objective. The FCA states that it will only make such announcements where it is in the public interest to do so and will (e.g., at [1.15]) "*make clear that we have not yet decided whether there has been misconduct or breaches of our requirements, unless it is inappropriate to do so*".

2.34 However, the intention of CP24/2 is to be more transparent – the only conclusion is that there will be more announcements of potential misconduct. The possibility cannot be excluded that more announcements of potential misconduct will lead to a decrease in the perception of trustworthiness without there actually being any actual increase in misconduct.

2.35 CP24/2 also refers to investor confidence. It does not make reference to the impact on other market participants – such as counterparties who may provide services to (or receive services from) the Subject. There is a material risk that any announcement would serve to undermine confidence in the Subject, and potentially the wider market, rather than increase it.

(4) FCA Objective:

2.36 CP24/2 is highly concerned about giving consumers (and the market) reassurance by making announcements about the FCA's enforcement activity so that consumers know the FCA is "*on the case*" [Foreword] and increasing public confidence that the FCA is "*effectively addressing*" risks to consumers (at [2.21]).

2.37 There is no logical connection between the FCA objective and the action the FCA proposes to take: the FCA can only be seen to be "*effectively*" addressing risks by taking effective action: an announcement of a proposed investigation, before the facts have been investigated, may give the appearance of action but it is not effective action. To the contrary, whilst there may be an initial bump in confidence, if, in the long term, investigations are announced but is then followed by a delay of several years before an outcome is determined, as is currently the case, consumers may well lose confidence in the effectiveness of the process.

2.38 The FCA's own position (as set out in Annex 1 to its response to the FSRC letter) is that around 67% of investigations result in no further action being taken. Once an announcement has been made, the harm to the firm (and any other negative consequences) will have crystallised, but that that harm will have been suffered needlessly in two-thirds of cases. The average length of time for a 'no further action' case to close is over three years: that is a very significant period of time in which that harm could crystallise and accumulate.

2.39 A better solution would be for the FCA to improve the speed with which it conducts investigations, and better publicise how its enforcement action has been effective in penalising transgressive firms, returning compensation to harmed customers and/or deterring other similar behaviours.

2.40 There is also the risk of the perception of bias or the reality of additional external pressure: the fact that the FCA has made an announcement about an investigation gives rise to the appearance that the FCA is under additional pressure to secure a 'positive result' in an investigation. Indeed, if consumer bodies or other action groups are made aware of the issue from the FCA's announcement, they may place pressure on the FCA to accelerate its investigation and, with expectations raised, may not be satisfied with the outcome the FCA ultimately secures. Should those concerns be elevated to members of Parliament, there is a risk of external pressure on the FCA to re-allocate or reprioritise its limited resources and to continue to pursue any investigation in a disproportionate manner. Equally, there is the risk that – where an announced investigation does *not* proceed promptly – that that will be seen as the FCA seeking to benefit from any impact of the announcement, without applying the resources

to resolving the investigation as promptly as possible. Again, this perception could undermine rather than increase confidence.

2.41 The FCA already has the power to (and does) provide indications of its areas of focus and priorities, and to provide education and deterrence to the market through the use of public statements, and publicised letters (such as consumer warnings, public "Dear CEO" letters, its MarketWatch publication and so forth). These no doubt increase confidence and we have seen the impact on financial services firms arising from these publications.

2.42 If urgent action is required to stop a particular issue the FCA has the power to publish a supervisory notice imposing restrictions on that firm. That is a more effective way of achieving immediate consumer protection and demonstrative effective intervention by the FCA.

2.43 We note that in exceptional cases where aspects of the matter are already public, then EG 6.1 provides for the FCA to indicate that it has commenced an investigation, and then to provide sufficient information to avoid the spread of misinformation in the absence of a public statement.

Reduced co-operation

2.44 We are concerned that the proposal may negatively impact the degree of cooperation between the FCA and firms, and reduce dialogue between them in relation to the FCA's supervision and enforcement functions.

2.45 Where firms are concerned that any investigation by the FCA could lead to early public announcements, it is inevitable that they will require internal investigations to be comprehensive to the point of being exhaustive before self-reporting. This will delay self-reporting in almost all cases as it will be natural for firms to be satisfied to a higher standard of confidence that such a step is required than previously. We also have concerns that some firms, after self-reporting, may be incentivised to rely more on the protection of legal privilege or adopt a less cooperative position generally in their engagement with the FCA in order to avoid immediate repercussions. This is particularly the case where the impact of a public announcement – on the firms revenue or profitability, or on its share price, or further investment, or its counterparties' willingness to continue to provide services – may far exceed the negative impact of potential fines imposed by the FCA at the end of the enforcement process.

2.46 Whilst we are sure that all firms will continue to take their Principle 11 obligations seriously, the reality cannot be avoided that in some instances the obligation to self-report is marginal and, where there is a risk of early publicity, firms will take a more cautious approach to self-reporting.

(5) Whistleblower Objective:

2.47 We agree that the FCA should encourage whistleblowers and that public statements made by the FCA that it will investigate matters which are brought to its attention by whistleblowers are important to help with the proper functioning of the regulation of the UK financial markets.

2.48 However, we do not agree that these proposals are necessary or proportionate to that objective. It is not clear why the publication of a Subject's name and/or other specific details about a particular investigation would be more effective than an anonymised statement and/or a general indication that the FCA will be focussing on particular sectors / products / regulatory breaches – steps which the FCA already has the power to, and does, take.

2.49 We consider that encouraging whistleblowing should be a matter for separate policy and/or consultation and could be better achieved in collaboration with other bodies by, for example, facilitating more accessible routes for whistleblowers to provide information to the FCA, creating a more open culture of whistleblowing across the financial market, increasing protection for whistleblowers and/or providing financial incentives to whistleblowers for information leading to successful enforcement actions (as is the case in other jurisdictions, such as the United States).

(D) Impact on firms

2.50 It is concerning that no analysis of the risk of harm to Subjects has been undertaken. That impact could be very substantial and it is not clear that the purported benefits of the proposals outweigh the likely harms. The FCA should conduct that assessment and re-consult on these proposals before taking any steps to implement them. This approach represents a serious departure from the FCA's current approach. The FCA has not provided any cogent explanation as to why it is appropriate.

(1) Departure from current approach

2.51 The FCA's current approach adopts this balancing exercise:

(a) EG 6.1.3 states that the FCA will consider the potential prejudice caused to any persons who are or are likely to be subjects of the investigation;

(b) EG 6.1.6 notes that, even where it is necessary to make an announcement due to leaked information, the FCA will take into account the views of the subject under investigation; and

(c) S. 391(6) FSMA requires the FCA not to publish warning notices if it would be "*unfair to the person with respect to whom the action was taken (or was proposed to be taken)*".

2.52 No justification for the divergence from these principles is provided in CP24/2. All that it says is that the FCA considers that "*assessing if publication of an announcement or update is in the public interest should, while taking account of all relevant facts and circumstances, be primarily focused on promoting* [its] *statutory objectives*". We do not consider that this is adequate.

(2) "No Wrong-Doing" caveats

2.53 The FCA proposes that any announcement will include a statement that no finding of wrongdoing has been reached. It implies that this will be an adequate mitigation of any potential harm to firms. We do not agree.

2.54 The FCA proposes to only make announcements "*where it is in the public interest*". Any announcement will be perceived as protecting the public interests against some wrong-doing, and perceived as being made on the basis of evidence which the FCA relies on to justify the announcement.

2.55 Given the FCA is relying on a the lack of confidence in the financial services market, the natural inclination will be to assume there is 'no smoke without fire' (although the point was better articulated by the Supreme Court in *Bloomberg LP v ZXC,* as to which see para 2.86 below). Inevitably, the financial and mainstream press will conduct their own investigations. Those articles could be published on the basis of incomplete information and risk further harm to firms and/or risk prejudicing both the firm and the FCA's investigation. It is also inevitable that individuals will make comments on, and speculate on, the announcement on social media: these social media posts may exacerbate any issues and continue the cycle of speculation.

2.56 Faced with such speculation, the Subject may not be in a position to adequately defend their position in the public arena and/or to their customers, investors, or counterparties, due to reasons of confidentiality or otherwise.

(3) Impact on firms

2.57 It is inevitable that any announcement will (pending the final outcome of any investigation) influence the way third parties interact with the Subject (notwithstanding any comment the FCA proposes to make).

2.58 The list of potential consequences for the Subject are extensive but in a choice between two firms, offering comparable services at comparable prices, where one of whom has been the Subject of an announcement, and where one of whom has not, it is trite to say that the latter would be the preferred choice. It is also trite to say that any commercial involvement with that firm will bear more risk. It is therefore inevitable that (whether or not they have committed a breach, which some two-third may not) Subjects will face:

(a) A loss of a proportion of its existing customer base to competitors (including in relation to products / services unrelated to the subject matter of the announcement);

(b) A fall in new customers who would otherwise have chosen to use the Subject's services (again, including in other product / service areas);

(c) An increase in consumer complaints, increasing the compliance burden through volumes of ill-founded complaints and requests for information from customers believing they might have a claim against the firm. For small and medium-sized market participants in the financial services sector, this could represent a significant financial impact not least from the Financial Ombudsman case-fee charge. This also raises the risk of any Ombudsman decisions diverging with the approach that the FCA proposes to take in its investigations;

(d) An increased perception of risk leading to new or existing debt-providers seeking to impose higher interest rates and/or refusing to renew borrowing at all and/or to new or existing equity investors choosing not to invest / continue to invest. For small and/or medium sized enterprises, the failure to be able to secure a timely funding round or secure affordable borrowing at a time of relatively high interest rates could be fatal;

(e) For larger, and particularly listed firms, the uncertainty around the investigation outcomes could heavily impact share price leading to increased scrutiny around its financial health, financing opportunities, or even takeover risk; and/or

(f) The risk that market counterparties decide not to continue to provide / receive services from that firm. The mere risk of negative-PR by association could cause some market counterparties to withdraw (or not renew) services, increasing Subjects' costs (as the service is brought in house) or rendering Subjects unable to continue to operate.

2.59 Taken together, the potential financial impact on firms is significant and, particularly for SMEs or disrupter firms who are heavily dependent on ongoing investment and growth, any one of these impacts could ultimately render the firm financially unsustainable, and cause its exit from the market, notwithstanding the fact that no enforcement action has been, or ever is, taken. The potential risk for consumer harm, a negative impact on competition, or even market instability is material.

(4) Impact on individuals

2.60 CP24/2 clarifies that the proposal does not include a similar approach to investigations into individuals. We address that further in our response to Question 3 below.

2.61 However, the impact on individuals should also be a consideration in deciding whether or not it is appropriate to make an announcement in respect of a firm. It is foreseeable that for smaller market participants, the announcement of an investigation into that firm, or into particular services / products within that firm, will be akin to announcing an investigation into those individuals. At the very least, the impact on individuals within a Subject should be considered in deciding whether or not to make an announcement and this should be an express part of the proposal (not merely left to 'all relevant facts and circumstances').

(E) UK competitiveness / international impact

2.62 Rightly, the FCA's focus is on its statutory objectives, including the integrity of the UK financial system. However, in [2.18], CP24/2 refers to the approach taken by the Monetary Authority of Singapore. That being the case, we feel it is appropriate to comment briefly on the approach taken by certain other regulators.

2.63 Any divergence from the approaches taken by the other main global financial services centres around the world are likely to have a significant impact on the competitiveness of the UK financial services market, and potentially on the comity between the UK regulators and other significant global regulators, notwithstanding the considerations set out in [3.6].

2.64 Many firms authorised by the FCA in the UK have authorisations in other jurisdictions and/or sister companies in other jurisdictions. Many of those jurisdictions adopt approaches consistent with the FCA's current approach. It is not clear what impact there would be on international comity / relationship between the FCA and overseas regulators, if the FCA acted on basis of UK public interest, but which had a serious detrimental impact on overseas entities.

2.65 In the United States, the U.S. Securities and Exchange Commission (**SEC**)'s guidance provides that it *cannot* make investigations public, save where allowed to do so by stature:

> *"It is the general policy of the SEC to conduct its investigations on a confidential basis to preserve the integrity of its investigative process* ***as well as to protect persons against whom unfounded charges may be made or where the SEC determines that enforcement action is not necessary or appropriate****. Subject to the provisions of the Freedom of Information Act, the SEC* ***cannot disclose*** *the existence or non-existence of an investigation or any information gathered unless made a matter of public record in proceedings brought before the SEC or in the courts*" (emphasis added)[13].

(F) Historic consideration by FSA

2.66 We have set out all of the above risks to the current proposals in response to CP24/2. However, the regulator is already well aware of the potential risk and of the need to balance the benefits or any changes against the potential harms that might be caused.

2.67 As long ago as 2008, the FSA (as it then was) considered the issue of transparency in Discussion Paper 08/3 (**DP08/3**). In those circumstances, the FSA was considering additional disclosure of information under pressure from consumer representatives (see para 2.1 of DP08/3). A number of the points raised in DP08/3 are relevant to CP24/2.

2.68 In the 'High Level Cost Benefit Analysis' (para 2.21 of DP08/3) (an exercise which is not conducted, even at a high-level in CP24/2, per Annex 2 para 2), it is noted that some disclosures may be:

> "*incorrectly interpreted by consumers* [leading to] *reputational costs for firms and a negative impact on market confidence, and the overall effect may not be beneficial",*
>
> "*poorly timed […]* [which] *could have costs in terms of exacerbating systemic crises and financial instability*".

2.69 Neither of these 'counterbalancing' views appear to have been considered in making the proposals set out in CP24/2.

2.70 Indeed, as regards that balancing act – at 6.95 the FSA noted:

[13] https://www.sec.gov/complaint/info

> "*a balance needs to be struck between various factors, including: 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*".

That balancing act appears to have been expressly excluded from consideration in this case.

2.71 Critically, at paras 4.12 – 4.14 of DP08/3, the FSA considered the issue of public censure powers and the need to comply with due process in light of the:

> "*significant procedural safeguards* [which] *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*".

2.72 The conclusion at that time was not to make further announcements or disclosures on enforcement investigations. It is not clear – from the perspective of natural law, statutory law, or principle, why the FCA's approach to these matters does not take account of these matters in the current CP24/2. We do not see that there is any legal, or principled, basis for those factors (which the FSA previously considered of particular importance) not to be taken into account.

(G) Where might it be appropriate to announce

2.73 The FCA's Enforcement Guide already makes provision for the FCA to make a public announcement during an investigation in exceptional circumstances such as where matters under investigation have already been made public and/or there is *misinformation* in the public arena which it is appropriate for the FCA to correct. These are entirely appropriate scenarios in which an announcement would be appropriate prior to, or on the commencement of, an investigation as well.

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.

2.74 The public interest factors set out in CP24/2 do not appear materially different to those which are considered for establishing 'exceptional circumstances' in EG 6.1.

Factors at paragraph 4.1.2 of the draft Enforcement Guide (Amendment) Instrument 2024	**Exceptional circumstances set out at EG 6.1**
4.1.2: [A public] announcement or update will usually be in the public interest when it is likely to:	EG 6.1.3: Where it is investigating any matter, the FCA will, in exceptional circumstances, make a public announcement that it is doing so if it considers such an announcement is desirable to:
(1) facilitate the protection of the interests of potentially affected customers, or consumers or investors more generally;	EG 6.1.3(2): protect consumers or investors.
(2) assist the FCA's investigation, for example by encouraging potential witnesses or whistleblowers to come forward;	EG 6.1.3(4): help the investigation itself, for example by bringing forward witnesses.
(3) address public concern or speculation, including by correcting information already in the public domain;	EG 6.1.4: The exceptional circumstances may arise where the matters under investigation have become the subject of public concern, speculation or rumour. In this case it may be desirable for the FCA to make

	public the fact of its investigation in order to allay concern, or contain the speculation or rumour.
(4) provide reassurance that the FCA is taking appropriate action;	EG 6.1.3(1): maintain public confidence in the financial system or the market.
(5) deter future non-compliance with the FCA's rules or other requirements or prohibitions that the FCA is responsible for enforcing; or	*No specific existing provisions.*
(6) otherwise advance one or more of the FCA's statutory objectives, including protecting and enhancing the integrity of the UK financial system.	EG 6.1.3(1): maintain public confidence in the financial system or the market; and EG 6.1.3(5) maintain smooth operation of the market.

2.75 In all material respects, with the exception of the additional 4.1.2(5), the public interest factors are the same as the existing criteria, and for the reasons expressed in section 2(C)(2) above, we do not consider that that the Deterrence Objective is likely to be furthered by the current proposals, above what can already be achieved with the FCA's existing powers and approach.

2.76 That being the case, it is not clear why the FCA considers the same criteria would be applicable to early announcements of investigations as it is currently applying to exceptional circumstances.

2.77 In short, we do not agree with the framework proposals of the public interest framework. We do not see why the FCA should alter its approach, without good justification, to make announcements of the kind proposed, other than in exceptional circumstances.

2.78 Further, for the reasons set out in section 2(D) above, we do not agree that the public interest framework should be the sole criteria by which the FCA decides whether or not to make an announcement. The potential impact on the Subject ought to be a relevant balancing factor.

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.

2.79 CP24/2 states that the FCA will not "*usually*" announce investigations into individuals (at [1.14]) but may do so where it is "*necessary for the purposes of our investigation or to carry out one of our statutory functions*" (at [3.17]). We do not agree that that is the appropriate approach.

2.80 We also consider that it is difficult to envisage a scenario in which it would be *necessary* to name an individual for the purposes of an investigation or carry out one of the FCA's statutory functions, beyond the exceptional circumstances already provided for in the existing guidance. However, not only must the announcement in relation to the individual be necessary (because there is absolutely no other route available to the FCA) but the impact of any potential harm to consumers or other third parties of not making an announcement is significant, and immediate, and outweighs the potential harm to the individual.

2.81 Neither of the examples given in [3.17] represent circumstances where it would be *necessary* for the FCA to make a public announcement that it is conducting an investigation into an individual (or a firm for that matter).

2.82 Encouraging (further) whistleblowers to come forward (in circumstances where an investigation has not yet been conducted, and the production of information under ss. 165 and 171-2 not yet utilised) does not suggest necessity: it suggests that the FCA is engaging in a 'fishing expedition' to see whether any wrongdoing can be flushed out. Similarly, if the FCA needs to fulfil its accountability to Parliament then it is open to the FCA to make confidential / non-public disclosures to Parliament: it is not *necessary* to name them.

2.83 It is arguable that the announcement of an investigation into an individual before a formal accusation of breach is put to them is akin to the police announcing an investigation into an individual before they are charged with the relevant offence. The impact of being accused of a criminal offence, and being accused of regulatory misconduct in the financial sector can often be very similar – a suspension or exclusion from being able to work in the sector (as we know from clients we have worked with this often akin to being unable to work at all, if one's lifelong experience is with the financial sector).

2.84 In that regard, we note the comments of the recent Supreme Court in *Bloomberg LP v ZXC* [2022] UKSC 5[14] in relation to precisely that issue: the right of a person under investigation but not yet charged not to be named.

2.85 Paragraphs 80 - 109 are as a whole illustrative of the point being advanced, and from which we have extracted only limited, specific comments in the interests of brevity. Throughout, we consider that the replacement of 'police' for 'FCA' and 'crime' for 'breach' could, and should, be read interchangeably. Emphasis is added throughout save where noted.

> "*For some time, judges have voiced concerns as to the negative effect on an innocent person's reputation of the publication that he or she is being investigated by the police or an organ of the state […] Several themes emerge from the material articulating those concerns […] the rationale for this uniform general practice is the risk of* ***unfair damage to reputation, together with other damage.*** *Third,* ***the practice applies regardless of the nature of the suspected offence*** *or the public characteristics of the suspect […] The damage occurs whatever the characteristic or status of the individual. Fourth, there is uniformity of judicial approach [… that] publication of information that a person is under criminal investigation will cause* ***damage to reputation together with other damage, irrespective of the presumption of innocence***.
>
> *[…]*
>
> *Leveson LJ recommended […] that:*
>
> > *"save in exceptional and clearly identified circumstances (for example, where there may be an* ***immediate risk to the public****), the names or identifying details of those who are arrested or suspected of a crime should not be released to the press nor the public."*
>
> *[…]*
>
> *Treacy LJ and Tugendhat J […] observed:*
>
> > *"The police arrest many people who are never charged. If there were a policy that the police should consistently publish the fact that a person has been arrested, in many cases that information would attract substantial publicity, causing* ***irremediable*** *damage to the person's reputation." (Emphasis added in the original by the Supreme Court).*

2.86 Concluding the summary, the Supreme Court noted, at paragraph 109:

> "*We would add that in the course of submissions reference was made to expressions such as "there being no smoke without fire" and that "mud sticks". […] We consider that such expressions obscure rather than elucidate the essential point, which in the event was accepted by Bloomberg, namely that* ***reputational and other harm will ordinarily be caused to the individual by the publication of such information. The degree of***

[14] https://www.supremecourt.uk/cases/docs/uksc-2020-0122-judgment.pdf

> ***that harm depends on the factual circumstances, but experience shows that it can be profound and irremediable***" (emphasis added).

2.87 The Supreme Court did note (at paragraph 77) that:

> "*it was common ground that if someone is charged with a criminal offence there can be no reasonable expectation of privacy. We consider, generally, that to be a rational boundary, as the open justice principle in a free country is fundamental to securing public confidence in the administration of justice*".

2.88 Reading across, if the FCA is seeking to secure confidence in its own exercise of its statutory functions, the clear precedent is that such confidence comes from investigating and then making a formal accusation against the individual.

2.89 In the absence of a statutory power to make announcements of the kind proposed in CP24/2, it is possible that the FCA is exposing itself to claims for breach of privacy, or other civil claims, by making announcements of the kind proposed.

2.90 Ultimately, the fact that the FCA considers it appropriate to take different approaches to individuals and firms only highlights the discrepancy in the approach taken to firms. The comments of the Supreme Court on irreparable harm may very well apply to corporate entities as to individuals.

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

2.91 As will be apparent from the foregoing, we do not consider that it is necessary or proportionate to include the identity of the Subject, or to prove information which would allow the Subject (or any individual within the Subject) to be identified.

2.92 Subject to that a reference to the industry sector and the regulation of legal provisions, and a high-level summary of the suspected breach / misconduct may be appropriate in some circumstances. Where possible the proposed announcement should be discussed with the Subject.

2.93 For the reasons noted above, we consider that the cautionary statement proposed at 3.21 (that the opening of an investigation does not imply that we have reached a conclusion that there has been a breach, failing, or other misconduct) is unlikely to be effective. In order to maximise its effectiveness, the cautionary statement should be prominent, and emphatic, and where possible the Subject provided with the opportunity to comment.

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.

2.94 CP24/2 proposes giving Subjects no more that one business day's notice (at [3.24]), or less where the announcement is potentially market sensitive (at [3.26]), or no notice in urgent circumstances (at [3.25]). It is not clear why (absent urgency) the standard approach will be one day's notice. The approach in respect of a warning notice would usually be after consultation with the relevant party in accordance with s. 391(1)(c) FSMA, following an opportunity to make representations (written and oral) to the RDC in accordance with the deadlines set out in the notice. CP24/2 offers no attempt to justify why one business day's notice would be appropriate in these circumstances.

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.

2.95 Please see out comments in respect of Question 1, generally.

2.96 Where an announcement has already been made, we consider that it is imperative that the FCA does make regular announcements about the progress of the investigation and/or that the Subject is permitted to make such announcements, to avoid unnecessary speculation giving rise to the risk of further potential harm.

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.

2.97 We are neutral as to this proposal. Where anything in the current Enforcement Guide forms part of the procedure which the FCA proposes to follow in relation to supervisory notices, warning notices, or decision notices, and is therefore something on which the FCA is obliged to publish and consult on in accordance with ss. 395 – 396 FSMA, we consider it should be retained within the Enforcement Guide. However, we do not see why it could not appear both in the Enforcement Guide and on the website: whether or not a matter falls within the FCA's statutory obligation to consult will be a matter of fact, rather than a matter of labelling (or whether or not that content appears in the Enforcement Guide or elsewhere on the FCA's website).

Questions 8 -14:

2.98 We assume that there will be further consultation on these proposals: we do not agree they are appropriate based on this consultation.

2.99 The explanations contained in CP24/2 are extremely brief and there are a number of changes proposed to the Enforcement Guide which are not expressly raised in CP24/2, such as the removal of EG 2.14. It is difficult to understand why an important procedural safeguard such as an independent legal review would be removed without consultation. We therefore only address the proposals briefly, and look forward to engaging with the FCA in any future consultation in which the FCA's position on *all* the proposed changes is set out.

2.100 Generally, the changes appear to be proposed out of a need to streamline the FCA's enforcement procedures. However, a number of these changes appear to be at the expense of important safeguards, and important guidance. Such an approach sets a precedent for the further loosening of safeguards in the future. The FCA's enforcement process should be efficient, but it should also be robust: focussed on producing the correct outcome, rather than just the fastest outcome. Speed should not mean that important stages of the investigation process are simply disregarded; speed should come from operational efficiency, and the availability of appropriate resourcing within the enforcement teams.

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?

2.101 We are neutral as to this proposal. However, it is not clear why the FCA would wish to limit the scope of the tools available to it.

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

2.102 Our comments on Question 7 are repeated.

2.103 The fact that the FCA does not expect to make regular or substantive changes to the Enforcement Guide in the future does not mean that it would not be appropriate to do so when it does make such changes. Of course, to the extent that any changes are matters falling within ss. 395 – 396 FSMA, the FCA must do so. Whether or not a matter falls within the FCA's statutory obligation to consult will be a matter of fact, rather than a matter of labelling (or whether or not that content appears in the Enforcement Guide or elsewhere on the FCA's website).

Yours faithfully,

Osborne Clarke LLP

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