Response to Financial Conduct Authority Consultation CP24/2: 'Our Enforcement Guide and publicising enforcement investigations – a new approach'

https://www.fca.org.uk/publication/consultation/cp24-2.pdf

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About the Transparency Task Force ('TTF')

- TTF is a certified social enterprise, established in 2015, whose mission is 'to promote the ongoing reform of the financial sector so that it serves society better'.

Q1. 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.

We believe it is a step in the right direction, but advocate going further in two key respects:

(i) The public interest test. As currently framed, the FCA proposal is to publish *when doing so is in the public interest*, with a set of tests for determining the public interest set out in par 3.5 of the consultation paper. We believe the test should be switched, so publication takes place *unless doing so would harm the public interest*, with the relevant tests set out in par 3.6. We do so for the following reasons:

- There are more reasons why publication might serve the public interest than there are for the opposite, so publication should be the default option;
- We believe the benefits of publication are understated in par 3.5. For example, publication reduces the probability of a disorderly market arising, especially when one or more of the firms involved is publicly quoted[1], encourages the FCA to pursue investigations with greater alacrity than is sometimes the case currently and facilitates greater scrutiny of the FCA by consumers, the industry, the media, politicians and other relevant stakeholders, thereby leading to enhanced transparency and accountability and, hopefully, performance and stakeholder support;
- We also believe that the adverse impacts of publication are overstated in par 3.6. In particular, we hold that concerns about the integrity of the UK financial system should not lead the FCA down the path of self-censorship, since the next logical step would be to exhibit reluctance to enforce in such circumstances;
- Changing the test to the one we propose creates a barrier to withholding the information, as opposed to a barrier to publishing it, which is consistent with the presumption in favour of publication that the FCA appears to be promising;
- Very often, the public interest can be protected by light-touch redaction of certain sensitive information, or changes to the timing of disclosures, rather than by a binary decision not to publish. A presumption in favour of publication would put pressure on the regulator to publish *as much as it possibly can*, rather than decide not to publish anything, when faced with legitimate public interest risks;
- A presumption in favour of publication, combined with a right to withhold information only when one or more test is met demonstrating that the public interest could be harmed by disclosure, affords the opportunity to enhance transparency by the FCA handing the role of determining whether those tests are met to a third party - for instance, the Financial Services Consumer Panel. While

[1] In that the alternative is allowing circumstances to arise, and perhaps persist for multiple years, in which a few insiders know more about the potential for enforcement outcomes than the wider market, which creates a high probability that the former will exploit that knowledge to mitigate losses or maximise profits at the expense of the latter

there are enduring concerns about the Panel's independence and legitimacy as a body representing consumer interests[2], we believe that the risk of subsequent public censure would result in the Panel's members being unlikely to approve the withholding of information in circumstances in which the public interest is unlikely to be harmed by such disclosure. We believe it would be inappropriate for the FCA itself to be responsible for deciding what to publish or withhold, as implied in par 3.12. There have been many cases in recent years in which the regulator's performance and conduct have been criticised, and there is an ever-present risk that it may make decisions motivated in part by the need to manage its own reputation and stakeholder perceptions, as opposed to the public interest

(ii) The quality and quantity of information disclosed. Currently, the FCA is proposing to publish information when it commences and concludes certain Enforcement investigations, and to provide updates at key stages. We believe it is possible for the regulator to go further in communicating its decision-making, and that doing so would help make it a more transparent, accountable and hence effective regulator. For example:

- Early stages: while some enforcement actions result from observations by supervisors or UBD[3], many result from complaints from consumers and alerts from whistleblowers, made to the FCA's Supervision Hub and whistleblowing team respectively. Currently, the standard approach of both departments is to acknowledge the inbound call or email, perhaps seek clarification or additional information, but not to indicate whether the matter has been escalated to a supervisor or UBD and above all to avoid communicating whether action will be or has been taken. The result is that, unless a matter is further escalated to Enforcement, which decides to investigate, and the FCA further decides to publish this fact, consumers and whistleblowers are kept in the dark. We think this is sub-optimal. It deters further provision of information, and it also deprives the person reporting concerns with a decision that - if they are dissatisfied - they can complain about, or take to judicial review. It may be that decisions not to escalate to Supervision or UBD or actions taken or rejected by those departments need not always be published, but we believe that the public would often benefit from such publication, and even where that is not the case, those providing the information should be told what, if anything, has been done with it, together with the rationale for the decision taken;
- Mid-stages: one of our concerns about the FCA is that an allegation of wrongdoing against a firm or individual has to clear many hurdles for Enforcement action to take

[2] Its members are appointed by the FCA, many of them have worked in the financial services industry, and few of them are able to demonstrate a prior track record in consumer advocacy within the sector
[3] The FCA's Unauthorised Business Department, which investigates firms and individuals suspected of conducting regulated activities without authorisation

place[4]. At each stage, the accused has a right to state its case. There is currently no symmetrical right afforded to the consumer/s and whistleblower/s who reported the alleged wrongdoing. Even where there are legitimate grounds not to publish certain information or to delay publication, disclosure to interested parties - where necessary under the terms of a non-disclosure agreement - would allow legitimate scrutiny and, where necessary, challenge, things that can currently be frustrated by a lack of transparency. For example, the recent Warning Notice concerning the roles of Woodford Investment Management Limited and Neil Woodford in causing losses suffered by investors in the Woodford Equity Income Fund omits all information on the enforcement outcomes sought by the FCA. Investors do not know whether restitution is sought, let alone how much; without this information, they cannot challenge the regulator; in contrast, the firm and individual will have been given that information and have the opportunity to seek to overturn the proposed sanctions via the RDC and Upper Tribunal;

- Late stages - we are concerned that situations currently arise in which consumers suffer avoidable harms because the FCA holds, but does not disclose, information about the findings of Enforcement investigations. To take a recent example, some 300,000 investors trapped in the Woodford Equity Income Fund voted for a Scheme of Arrangement proposed by Link Fund Solutions Limited ('LFSL'), the Fund's Authorised Corporate Director, without having sight of the Decision Notice setting out the findings of the FCA's four-and-a-half year investigation into the firm; frustratingly, the regulator stated that the document would be published immediately *after* the Scheme received approval - a near-inevitable outcome, given that creditors were deprived of the opportunity to gauge the strength of the regulator's case for extracting more generous redress from the firm by means of a restitution order. We suspect that this reluctance to share findings extends to other statutory bodies, because the Financial Ombudsman Service likewise paused its determinations of cases relating to LFSL long past the point at which the FCA could have shared sufficient information with the Ombudsman for it to reach fair decisions, another course of action that would have left consumers far better placed to decide whether to accept or reject the compensation offered by LFSL.

In conclusion, while we welcome in principle the FCA's apparent willingness to publish more information about Enforcement investigations in the future, we believe it could - and should - go a lot further.

[4] It must be escalated from the Supervision Hub or whistleblowing team to Supervision or UBD; Supervision or UBD must decide there's a strong enough case to answer to escalate it to Enforcement; Enforcement must decide the alleged wrongdoing is 'serious' as opposed to merely 'wrong' (there have at different times been varying tests applied) and that the allegations are true; Enforcement must then persuade the Regulatory Decisions Committee (which is packed with people with obvious industry affiliations) that its proposed measures are warranted; the firm/s or individual/s then have a right to challenge the RDC's verdict and then formally to appeal to the Upper Tribunal

Q2. 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 concerns about the proposed framework are set out in detail in our answer to Q1, above.

Q3. 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.

We disagree. While we have not had an opportunity to obtain specialist legal advice in connection with this question, we would be surprised if the FCA's operational objectives, which are created by statute, do not give it lawful reason to publish the names of those it investigates.

In the main, individuals who might be named are those who are covered by the Senior Managers and Certification Regime ('SMCR'). They are therefore acting as officers of a company, and performing regulated functions, in connection with which they are already named on the FCA Register. As keeper of that register, the regulator is expected to ensure that those named on it are fit and proper. If allegations have been made against such an individual, it would surely be suboptimal, and perhaps negligent, of the regulator not to publish that individual's name and an outline of the allegation in order to prompt others to come forward with relevant evidence for or against - or, indeed, other allegations.

Some other individuals who might be named by the FCA are those who are alleged to have conducted regulated activities without authorisation. If proven, it is likely that such allegations could lead to prosecution. In other fields of life, it is commonplace for those charged, or even arrested, in connection with alleged criminal offences to be named. We find it difficult to believe that the same should not apply simply because the FCA, rather than the Crown Prosecution Service, is the lead prosecutor of such offences. And we believe that the FCA's consumer protection objective *requires* it to publish such names: as with those covered by SMCR, other evidence could emerge as a result of doing so.

Finally, we are concerned that publishing the names of firms but withholding those of individuals presents two insurmountable risks. The first is that, in the absence of information to the contrary, suspicion may fall on the wrong individuals within a firm. Any attempt to remedy this by publicly exonerating them would eventually lead to the genuine subjects being identified; this being so, it is surely better to do so at the outset. The second is that creating a situation in which firms under investigation are named but individuals are not

risks perpetuating and entrenching an already grave problem, namely that individuals are seldom held to account, with regulatory action instead focusing on fines levied on shareholders - who, with the exception of those of owner-managed firms, are seldom responsible for wrongdoing, or even aware of it, or able to stop it happening.

There is a characterisation of the FCA, which it would doubtless consider unfair but that is nonetheless widespread, that its practice of punishing innocent shareholders while protecting guilty executives is an example of regulatory capture. The regulator has an opportunity to use its new-found enthusiasm for transparency to rectify this; in our view, it should do so, by ensuring that individuals are named wherever credible allegations exist against them.

Q4. Do you agree with the proposed content of our announcements? Please give reasons for your answer if you do not agree.

We agree with the content set out in par 3.20, provided such information can be disclosed without identifying whistleblowers. However we would like the FCA to go further and also specify what measures it is taking to investigate and how long it expects the work to take. This information is important because it can, in the best scenario, reassure stakeholders and, in the worst, provide them with sufficient grounds to express concerns and put pressure on the regulator to act more inquisitively, with greater urgency, or both. We make this point against a background of investigations that routinely take multiple years to conclude, and which do so unsatisfactorily; we hope and believe that greater transparency will lead to more accountability, which in turn will result in improved performance, and hence stakeholder support.

Q5. Do you agree with our proposed methods of publicising an announcement and updates? Please give reasons for your answer if you do not agree.

We agree; and we go further. Where an investigation involves a publicly quoted firm, or any assets that are publicly traded, we believe there should be an obligation on the FCA to publish *as soon as reasonably possible* after credible allegations are made. Failure to do so risks creating a disorderly market in which some parties know market-sensitive information and others do not, as happened in 2014 when the FCA mishandled an announcement about an investigation into closed-book life insurers.

Q6. 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.

As set out in Q1, we advocate switching the public interest test set out in 3.27: the FCA should publish *unless it is in the public interest not to do so*, rather than the other way round.

Questions 7-16 inclusive

We have not answered these questions, as we consider ourselves ill-equipped to do so. However, we wish to highlight some concerns we have about the announcement of this consultation and Therese Chambers' accompanying speech.

The former contains the following paragraph:

'In the future the FCA will focus on a streamlined portfolio of cases, aligned to its strategic priorities where it can deliver the greatest impact. The FCA will also close those cases where no outcome is achievable, more quickly.'

Meanwhile the latter contains this statement:

'Through our approach we will focus on a streamlined portfolio of cases through we can deliver the greatest deterrent impact, acting at pace and with greater transparency.'

Taken together, and in the context in which they appear, these comments appear to be painting a picture of a regulator that is pivoting from conducting a lot of Enforcement investigations to one that, in the future, will be more selective, picking 'quick wins' and making a lot more noise about them, in the hope that this will create the impression of more activity and hence have a greater deterrent effect.

This may or may not be a sound strategy; but it is a controversial one, and we are concerned that the consultation does not set it out in an honest and transparent fashion and ask for feedback on it. We believe there is a risk that the FCA may misrepresent broad support for better communications around Enforcement investigations as stakeholder endorsement for a dramatic pivot in strategy for which consent has not even been sought, let alone obtained.

Furthermore, we are worried that both the announcement and the speech could signal to bad actors in the industry - and those conducting regulated activities from outside the regulatory perimeter - that their chances of being apprehended and punished in the future may be even lower than they are today. In our view, this is both reckless and irresponsible behaviour by a statutory regulator that ought to know better.

Many stakeholders may consider that the FCA's Enforcement activities are already insufficient, and that more is needed, not less. For example, Chambers' speech contains the claim that, 'The total value of frauds from the convictions we secured since April 2023 amounts to just under £24 million'. The FCA's own Consumer Investment Strategy update shows that £748 million[5] was lost to consumer investment fraud in the preceding year, of which less than £5 million was paid out in redress. It is difficult to escape the conclusion that the perpetrators of such crimes enjoy a very high probability of escaping prosecution[6], while the victims suffer a very low prospect of receiving any compensation[7]. It is our view that more Enforcement action is needed, not less. Picking the 'easy wins', and making a lot of noise about them, is no substitute - especially after the regulator has been reckless enough to signal to perpetrators that this is its plan.

The journey to the FCA becoming a fit-for-purpose regulator will be a long and painful one. It starts with transparency and accountability. Attempting to get a 'do-even-less' Enforcement strategy waved through under the guise of a consultation about enhanced communications is not transparent behaviour. The FCA's board claims that the organisation wants to be more transparent and accountable; yet its conduct in respect of this consultation appears to be opaque. If, as we fear, this marks the start of a reduction in enforcement activity, it is important that those responsible are subsequently held to account for it.

[5] Table 2
[6] The figures in this paragraph indicate that less than 3.3p in every Pound of investment fraud results in prosecution. Put another way, the perpetrators of a financial scam stand a 96.7 percent chance of getting away with it
[7] Less than 0.7p in every Pound was paid in redress; for every £1000 lost to financial scammers, only 67p is recovered