

COMMODITIES | MAY 2024

FCA PROPOSALS FOR PUBLICATION OF INVESTIGATIONS HAVE MERIT IN SOME CIRCUMSTANCES BUT THERE ARE SERIOUS CONCERNS

The Financial Conduct Authority's (FCA's) recent proposals to publish details, including the firm name, when it opens an investigation, have met with a huge amount of commentary, much of it highly critical; including from politicians.

Plainly the rights of the public must be weighed against the rights of the firms. Most would agree that the operators of an illegal Ponzi scheme should be exposed to prevent further loss to prospective investors.

On the other hand, firms very reasonably worry that their reputations will be tarnished by the publication of the fact of an FCA investigation into them and there is the basic principle that everyone is innocent until proven guilty. This is compounded by the fact that the FCA closes the vast majority of investigations taking no action at all. Firms worry their reputations will be unfairly tarnished and suffer serious detriment as a consequence in connection with an investigation which ultimately goes nowhere.

Against this backdrop the FCA needs to do more to assure firms that publication will only take place where circumstances absolutely require it (and in most cases this will not be so).

What is proposed?

The FCA [consulted](#) in March and April¹ on a change to its policy on publishing information about investigations that it has opened. At present it does not usually publish any information unless and until the investigation results in an outcome such as a censure or a penalty. However, the FCA has proposed that it will publish information when an investigation is opened including the subject of the investigation and a summary of the suspected breach, misconduct or failing being investigated, if it is in the public interest to do so. It will also publish updates on the investigation.

Considerations that the FCA will take into account in determining whether an announcement is in the public interest include the likelihood it will:

- allow the interests of those potentially affected, such as customers, consumers or investors to be protected;
- encourage witnesses or whistleblowers to come forward;
- address public concerns or correct information already in the public domain;
- provide reassurance that the FCA is taking action;
- deter future rule breaches; or
- otherwise meet one of the FCA's statutory objectives such as protecting and enhancing the integrity of the UK financial system.

There are also a few factors listed that may suggest an announcement is not in the public interest such as if it might impact on the conduct of the investigation by another regulator or law enforcement agency, or the stability of the UK financial system.

¹ The consultation closed on 30 April 2024.

The consultation states that the factors outlined above do not include the impact on the investigation subject, as the FCA's view is that the public interest assessment should be primarily focussed on its statutory objectives. However, unless inappropriate the announcements will state that an investigation should not be taken to imply that the FCA has reached any conclusion on whether there has been misconduct, and if the investigation is closed without action, then this will also be announced.

Where the FCA takes the decision to announce an investigation, or to provide an update on an investigation, it will usually give the subject one business day's notice or, if there is an urgent need to announce, no notice. The consultation states that it is proposed that once the policy comes into force it will apply to new investigations but also existing ongoing investigations.

Generally, the names of individuals being investigated will not be published, as the FCA considers that this would be prohibited by the UK GDPR and Data Protection Act 2018, and that there are also considerations under the European Convention of Human Rights, although it indicates that in some circumstances it may be able to make a lawful announcement in the public interest.

The reasons that the FCA outlines for its proposals, are to improve transparency, to use transparency as a regulatory tool, and as part of its transformation to become a more innovative, assertive, proactive regulator. It takes the view that currently, by the time outcomes of investigations are published, some of the value of the information, in terms of reassurance and its educational value, is lost.

Reaction

The FCA proposals, it is fair to say, have met with a barrage of criticism from a number of quarters. In particular, there has been correspondence between the House of Lords Financial Services Regulation Committee and the FCA. This has culminated in the Committee [announcing](#) on 9 May that it would be taking evidence and examining the proposals².

The Committee first [wrote](#) to the FCA on 18 April to set out its concerns about the consultation. The Committee's view was that the proposal risks a disproportionate effect on firms that are named, and the overall integrity of the market through, for example, unwarranted effect on share prices. It is also likely that individuals will have their reputations unfairly tarnished through association with a published investigation.

The FCA initially [responded](#) on 25 April and has published two further letters dated³ 7 May ([here](#) and [here](#)). In its letters it stated that it was moving from a position of a presumption against publication of the fact of an enforcement investigation to a public interest framework for making the decision on disclosure, but there would be no presumption in favour of disclosure, so that in some cases there will be disclosure and in some cases not. The FCA will also assess in each case what an announcement or update should contain, including whether to name the subject, taking all relevant facts into account. On the question of whether publishing the name might impact on the viability of a firm, the FCA indicates that it will take this risk into account, and would consult with the PRA where the firm is dual regulated.

The FCA's view is that there have been past instances where earlier publication would have enhanced its response and the market reaction, for example if it could have more overtly communicated the failings it had found on anti-money laundering controls before the regulatory outcomes in 2021 – 2023.

The letters set out a number of reasons why the public interest might be to name firms in a factual and measured way. This includes: where the detail of the misconduct is in the public realm anyway (such as customer service disruption at a major bank), where there is potential ongoing and significant consumer detriment, or to obtain necessary evidence. The FCA letters also indicate a sustained high level of interest from Parliament in investigations of significance.

The FCA points to other regulators that publish details about the opening of an investigation, including Ofcom, the Competition and Markets Authority the Financial Reporting Council, Ofgem and Ofwat. In response to the point made by many that the US SEC, Swiss FINMA, and French AMF do not take the approach the FCA is proposing, it is said that they have different objectives, no wide-ranging consumer protection objective, and no criminal prosecution powers for investors in relation to fraud.

The letter states that the FCA's partner agencies do not typically provide for an appeal process on a decision to name, but that an individual or firm could seek an injunction or to have the decision judicially reviewed. It also notes that any proposed investigation announcement would almost certainly not be the first a firm has heard of an investigation, on the contrary it will be made aware in most circumstances when it is referred to enforcement, and so would have time to raise any concerns about a decision to name.

² The work of the Committee will of course now be affected by the dissolution of Parliament and the general election.

³ These were addressed to the Treasury Sub-Committee on Financial Services Regulation

The FCA has noted that some respondents to the consultation have suggested an "Enforcement Watch" publication that sets out an overview of enforcement activity without names. The FCA considers this could be of value in bringing together themes from its work, and says it is considering all proposals and wants to understand how stakeholders consider that this provides the same impact as disclosure in the public interest.

A number of parties have raised the view that the FCA's proposals are not in line with its new secondary growth objective, and the Financial Times⁴ reported that the Chancellor Jeremy Hunt is one of these. The FCA addresses this point in its letters, flagging that only a tiny minority of regulated businesses will face enforcement investigations, and that for listed firms in major markets with disclosure requirements the proposals do not change the status quo. The FCA's view is that strong cooperation with its global partners on enforcement is fundamental and key to competitiveness for UK firms operating cross-border. Those global partners need to have confidence that the FCA keeps markets operating with high integrity.

In addition to the Committee, the financial services industry itself, including the insurance market has indicated its strong opposition to the plan. The IUA has [warned](#) that premature publication of an investigation may give the impression of systemic problems in the financial services industry, impacting other companies not subject to investigations. The plans may also increase the cost and restrict D&O insurance availability for FCA regulated firms.

The FCA has noted however, that consumer groups, groups representing retail investors, and those with experience of dealing with whistleblowers, have viewed the proposals significantly more positively.

Comment

Much of the response to the FCA's proposals stems from a lack of confidence in the process in circumstances where (1) the FCA has not been clear as to exactly how it will weigh in the balance the prejudice to the firm that publication will cause, and (2) the FCA's own data makes clear that it closed 67% of its investigations without action in 2023/24. The average time to case closure without action was 37 months, or 43 months across all cases⁵.

In our view, although many criticisms of the proposals are well-founded, there is a balance of interests to be struck here. On the one hand it is understandable that there might be a need for example, for consumer victims of alleged widespread bad conduct, to know that it is being investigated beyond a general statement. However, the concern is that the FCA will in practice apply a blanket presumption of disclosure across both serious and routine cases, too many of which lead nowhere.

It is helpful to compare the proposed position with the SFO's publication policy. Generally speaking, the SFO keeps details of investigations confidential, but this changes where:

- The company itself makes the investigation public, for example if a publicly listed company considers it to be market-sensitive. In this case the SFO will usually confirm the fact and focus of the investigation;
- There are operational reasons to announce the investigation, such as the need to uncover witnesses in order to progress it;
- There is some other substantial reason why the announcement would be in the public interest.

A substantial public interest might exist, for example, in a disclosure in order to stop members of the public investing more money in a fraudulent scheme. Applying the test outline above, the SFO named five firms as newly under investigation in the year to end of March 2024⁶. A similar test of substantial public interest coupled with more detail as to how all relevant factors will be considered, may present a better approach to FCA disclosure.

⁴ "Jeremy Hunt warns FCA against "naming and shaming" businesses under investigation" 30 April 2024

⁵ Taken from the FCA's response to the Committee. The FCA's response also sets out how it intends to reduce this time.

⁶ According to the FCA response to the Committee

Rarely does an FCA consultation attract so much commentary, and we wait to see whether it has rethought any aspects of its approach when it publishes its response to the consultation. It is likely that in light of the Committee investigation, as well as the amount and depth of feeling the proposals have generated, that this might take some months.

For more information, please contact the author(s) of this alert



BARRY VITOU

Partner, London

T +44 (0)20 7264 8050

E barry.vitou@hfw.com

[hfw.com](https://www.hfw.com)

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