

UK Financial Conduct Authority Consults on Publicising Enforcement Investigations

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The UK Financial Conduct Authority (“FCA”) has recently issued a [consultation paper](#) on its plans to publish information about enforcement investigations that it has opened. This represents a major departure from its long-standing practice of maintaining public silence unless and until an investigation results in a decision against a firm or individual. The consultation invites responses by 16 April 2024.

Therese Chambers, the FCA’s joint executive director of enforcement and market oversight, emphasised in a [speech](#) that this new approach is aimed at deterring misconduct and increasing transparency in relation to enforcement activity. It is also intended to benefit other market participants (who will be able to receive some insight into what topics the FCA is focused on and what it expects), as well as the general public (who should gain reassurance that the FCA is taking action in those areas).

Framework for Announcing Investigations. Like many overseas financial markets regulators, the FCA very rarely publicises the fact that it has commenced an investigation or discloses any information about its progress, unless and until it results in an actual or proposed action against the subject. The FCA now proposes to publish information regarding its investigations into regulated firms at an earlier stage where it is in the public interest to do so. In addition, it intends to issue updates on ongoing investigations and announce the closure of investigations that have not resulted in enforcement action. It will continue not to disclose investigations into named individuals, largely due to data protection concerns.

The consultation paper explains that the FCA considers an announcement or update will be in the public interest if it is likely to:

- Facilitate the protection of the interests of customers, consumers or investors;
- Assist the FCA’s investigation, for example by encouraging potential witnesses or whistleblowers to come forward;
- Address public concern or speculation;

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- Provide reassurance that the FCA is taking appropriate action; or
 - Deter future non-compliance with the FCA's rules or requirements.

On the other hand, an announcement may not be in the public interest, if it is likely to have an adverse effect on the conduct of an investigation, the interest of consumers, or the stability of the UK financial system.

The FCA's announcement may include:

- The identity of the firm being investigated;
- The industry sector of the firm under investigation;
- The relevant laws or regulations that may have been breached;
- A summary of the suspected misconduct; and
- A note that the announcement does not imply that the FCA has reached any conclusions about the conduct under investigation.

Although the FCA states that it will give the subject of an announcement some advance warning, this will not normally be longer than one business day's notice. In urgent cases, the FCA may give firms no notice at all. However, the timing of market-sensitive announcements will take into account relevant stock exchange opening and closing times. It is not clear how the FCA will handle cross-border, multi-agency cases where early publicity may conflict with the confidentiality that parallel investigations may enjoy and therefore significantly complicate the progress and resolution of such matters.

Analysis. With the FCA's two Enforcement Directors less than a year into their new roles, this unexpected proposal signals an important change in approach from the previous director. Since 2015, the FCA's aim has been to open a large number of 'diagnostic' investigations and see where they lead, but it has often struggled to manage this workload and close out its investigations in a timely manner. A radical increase in the transparency of investigations will shine a public spotlight on each case, making the FCA more accountable and putting pressure on it to conduct investigations more quickly. As a result, we expect the number of new cases to decrease, with more resources focused on progressing each matter efficiently.

While the publication of new investigations (and those that were ongoing when the change comes into effect) is likely to be valuable for other firms and the public, it will

have extremely serious consequences for firms under investigation. Firms will come under intense scrutiny from shareholders, investors, clients, counterparties and other stakeholders, suffering considerable reputational and even financial damage.

Since the FCA will have gathered quite limited information and not conducted any witness interviews before opening an investigation, it is common for its views to evolve in the course of its work over a period of years. Firms will have little or no time to discuss the wording of an announcement and will largely need to rely on the FCA to explain accurately what may be an extremely complex scenario in which the FCA's own thinking is at a very early stage. Further, given that the threshold for the FCA deciding to commence an enforcement investigation is likely to rise in practice (due to it opening fewer investigations that are subject to heightened internal and external attention), stakeholders may view an announcement as indicating that the firm has very likely breached a law or FCA rule when ultimately this may not be proved. Moreover, for as long as a firm is under investigation, it will face even greater pressure to resolve it as soon as possible by negotiated settlement, making any challenge to the FCA's position even less appealing than is currently the case.



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