TheCityUK

TheCityUK response to FCA CP24/2 'Our Enforcement Guide and publicising enforcement investigations – a new approach'.

TheCityUK is the industry-led body representing UK-based financial and related professional services. We champion and support the success of the ecosystem, and thereby our members, promoting policies in the UK and internationally that drive competitiveness, support job creation and enable long-term economic growth.

The industry contributes 12% of the UK's total economic output and employs over 2.4 million people – with two-thirds of these jobs outside London across the country's regions and nations. It pays more corporation tax than any other sector and is the largest net exporting industry. The industry plays an important role in enabling the transition to net zero and driving economic growth across the wider economy through its provision of capital, investment, professional advice and insurance. It also makes a real difference to people in their daily lives, helping them save for the future, buy a home, invest in a business and manage risk.

Summary

TheCityUK recognises the importance of enforcement to the FCA's role in protecting consumers from harm. However, we do not think that the FCA has shown that its proposals as set out in CP24/2 will advance this objective, nor will they help the FCA to achieve its stated aim of reducing and preventing serious harm. Indeed, the proposals to announce investigations are fundamentally flawed.

The proposals outlined in this consultation do not support the FCA's primary objectives to protect the integrity of the financial system and to promote effective competition. They are also not proportionate.

Crucially, given the globally mobile nature of the financial and related professional services industry, the proposals do not align with the FCA's new secondary objective on international competitiveness and are not in keeping with the approach taken in other major financial centres around the world. On the contrary, if implemented they would seriously undermine the UK's international competitiveness and make the UK a less attractive place to do business and invest, ultimately hindering the growth of the industry and of the wider economy.

As explained below, the proposals risk doing substantial harm to businesses under investigation, who should benefit from a presumption of innocence. The risk of such harm to presumed innocent parties should only be contemplated if there are clearly greater countervailing benefits. The FCA has not shown this to be the case. Indeed, the FCA could achieve its aim of creating a stronger deterrent effect by announcing investigations into certain types of wrongdoing without naming firms or individuals.

Consultation response

Our response to the key questions posed in CP24/2 is set out in more detail below.

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?

No. We are strongly opposed to this proposal for the following reasons:

a. The proposed announcements will have significant negative impacts on investor confidence, the functioning of markets, and particularly on those firms who are investigated but subsequently found not to have committed any wrongdoing. This is especially the case given that these impacts could be long lasting due to the length of time investigations take. The FCA's own annual enforcement performance data for 2022/23[1] illustrated that the overall average duration of the investigation stage for cases closed in the past 3 years, was 41 months. This represents an increase of 64% from the year 2021/22 where the overall average duration was 25 months. The negative impact from being named as under suspicion of wrongdoing for so long is unlikely to be remediable even if the FCA goes on to issue a decision clearing the party.

b. The credibility of the FCA's proposals is significantly undermined by its statement in paragraph 3.8 that it recognises the proposed new approach 'may raise concerns about potential impact on our investigation subjects. We have, however, not included such impact as a specified factor in our proposed framework'. The potential impact on firms and their customers (who may also suffer negative impact from reputational effects) of the proposals *ought to be a key consideration*, particularly given that the FCA itself states that around 65% of its investigations are closed without further action. We do not believe that the potential significant harm, and length of harm, that firms may suffer from being named is at all proportionate to the FCA's objective of increasing the transparency of its enforcement function. This is especially the case for small and medium-sized firms where the potential for significant harm in terms of outflows has not been considered. The reputational damage to small firms and start-ups, in particular, could be fatal to the business if customer or investor confidence in the business is irreparably damaged. We do not believe that the potential significant harm, and length of harm, that firms may suffer from being named is at all proportionate to the FCA's objective of increasing the transparency of its enforcement function. This is especially the case for small and medium-sized firms where the potential for significant harm in terms of outflows has not been considered. The reputational damage to small firms and start-ups, in particular, could be fatal to the business if customer or investor confidence in the business is irreparably damaged. This risks the unintended consequence of stifling innovation and hindering the growth of newer entrants to the market. There ought to be a presumption against announcing the names of subjects of enforcement investigations.

c. This is underscored by the fact that the FCA can already name the subjects of an investigation in exceptional circumstances where it believes doing so will support its objectives, but it rarely does so. In addition, currently, when 'Warning Notices' are published, the subject can be named; but, again, this is rarely done. We question the logic of consultation proposals for more information being announced at the earlier stage of commencing an investigation than is currently announced when a Warning Notice is published, noting that the FCA is further on in its investigation at such stage.

[1] https://www.fca.org.uk/data/fca-operating-service-metrics-2022-23

d. Moreover, by affecting market confidence in a firm that is subject to an FCA announcement, the proposals risk negatively affecting the PRA's objectives to promote safety and soundness and the BoE's objective to promote financial stability. This is particularly the case given the risk of some media outlets and social media sensationalising announcements and potentially prompting a loss of consumer/market confidence in a firm which could, in extremis, lead to a run on a bank, for example and therefore a risk to market stability. Indeed, the seriousness of the risks of unintended consequences from any publicity surrounding announcements, including potentially sensationalist and/or inaccurate reporting, far outweigh any potential perceived benefits for the FCA from improved transparency of its enforcement activity.

e. At 2.15 the FCA sets out what it considers to be the legal restrictions to be taken into account. However, it is not clear whether consideration has been given to the fact that there is no duty to publish investigations, and that to do so could be disproportionate and comprise an unlawful interference with subjects' rights, including under European Convention of Human Rights (ECHR).

f. The FCA's assertion that the proposed changes are compatible with its secondary international competitiveness and growth objective is not backed up by any evidence. A stable, predictable and proportionate regulatory environment is a vital foundation for ensuring the long-term growth, competitiveness and success of the UK as a leading international financial centre. By proposing to name firms before any fault has been established, these proposals would undermine the UK's reputation for stable, predictable and proportionate regulation. The proposals are out of kilter with how other jurisdictions operate - including in the EU, Hong Kong, the USA and Singapore - and risk making the UK a less desirable place to invest and conduct business. For example:

   - **In the US, the Securities and Exchange Commission's (SEC)** Enforcement Manual mandates confidentiality during the investigation process: '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…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'[2]
   - **In the EU, the European Securities and Markets Authority (ESMA)** has since 2018 published more detailed public versions of its enforcement decisions, in order to provide more details on the reasons for its findings but does not disclose information about the start of an individual investigation.[3]
   - **In Singapore, the Monetary Authority of Singapore (MAS)** announces enforcement actions following the conclusion of investigations. However, its approach to announcing investigations is more nuanced and set out in its Enforcement Monograph[4]. This states that the MAS will not announce every enforcement action**.** The abiding consideration

[2] https://www.sec.gov/complaint/info
[3] www.esma.europa.eu/esmas-activities/supervision-and-convergence/sanctions-and-enforcement
[4] https://www.mas.gov.sg/-/media/mas/news-and-publications/monographs-and-information-papers/enforcement-monograph-final-revised-apr-20221.pdf

appears to be whether it is in the public interest to make announcement, and it will also consider whether an announcement will jeopardise the investigation or prejudice court proceedings. Empirically, the announcement of investigations which are ongoing and not yet concluded is rare, and analysis suggests that in the 18-month period covered by the latest enforcement report, they published less than 1% of cases.

g. The FCA can already name the subjects of an investigation in exceptional circumstances where it believes doing so will support its objectives. The FCA has not presented any evidence that routinely naming the subject of the investigation will make any difference to the outcome of that investigation or to the factors outlined in its proposed public interest framework (see our response to question 2 below).

h. The FCA has pointed to the fact that some other UK regulators have the powers to, and on occasion do, name the subjects of investigations as an argument that the FCA should adopt a similar approach. However, while other regulators may be able to name subjects, in practice they rarely do. Indeed, the approach of the Serious Fraud Office (SFO) to investigations should be informative: '*We try to provide as much information as we can without compromising law enforcement work, prejudicing the right of defendants to a fair trial, or causing avoidable reputational damage or harm to individuals or businesses under investigation. In practice the amount of information we can provide, particularly about cases which are in the investigation stage, is usually very limited*'.[5]

i. Moreover, the globally mobile nature of the financial and professional services industry makes financial services companies much more vulnerable to reputational impact and global market volatility than other industry sectors. It does not therefore make sense for the FCA to follow the example of UK regulators for different sectors, such as energy, water or media, whose industries are very different from, smaller than, and less internationally mobile than financial services companies. Indeed, a more relevant comparison would be the Bank of England (BoE) / Prudential Regulation Authority (PRA). Despite publishing a range of statistics and information about the number of investigations and their outcomes, they make clear that they 'do not usually make public the fact that we are investigating a particular firm or individual'.[6] In determining whether to make a public announcement, the PRA would "consider any potential prejudice, risk of unfairness and/or disproportionate damage" to investigation subjects, and not publish information having determined that publication would be: (a) unfair to the persons concerned; (b) prejudicial to the safety and soundness of relevant bodies; and (c) detrimental to the stability of the UK financial system.

j. Furthermore, the FCA's predecessor the Financial Services Authority (FSA), which set out its approach to enforcement investigations in CP17[7]. It stated that: "We propose that, as a general policy, the FSA will not make public the fact that it is (or is not) investigating a particular matter. Publication of the fact that an investigation has been commenced by the FSA may prompt unwarranted public concern about the matters and persons within the scope of an investigation.

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[5] https://www.sfo.gov.uk/our-cases/
[6] https://www.bankofengland.co.uk/prudential-regulation/the-bank-of-england-enforcement
[7] In CP17, the FSA consulted on its enforcement powers under the Bill which would become Financial Services and Markets Act 2000

It may put consumers' funds at risk or do unwarranted damage to the reputation of firms, issuers or individuals involved.' The FCA has not adequately explained why it believes this is no longer the case.

k. The consultation paper notes three significant benefits of communicating more about FCA investigations. We believe that these benefits can be achieved by adopting an anonymised and thematic approach to communications regarding FCA investigation and enforcement activity. There are also several existing alternative means to achieving these proposed benefits without causing harm to firms (and their customers) under investigation, such as through 'Dear CEO' letters, industry workshops, speeches, seminars and press articles. Addressing each of the three purported benefits that the FCA highlights in its consultation:

    - "It builds trust in the system and the public will know we're on the case."
        - The FCA does not explain why naming parties, as opposed to simply announcing the market being investigated and the nature of it, would create additional trust.
    - "Firms and the market will benefit too. By being clearer about the types of misconduct we think warrant a formal investigation, it allows other firms to learn lessons, raise their standards and think twice about doing the same at a much earlier stage than currently."
        - It appears that this benefit could be fully realised by simply announcing the nature of the investigation and the relevant market. It is not clear and the FCA does not explain why naming parties would help achieve this benefit.
    - "It will support our accountability by shining a light on the efficiency and pace of our investigations."
        - The FCA does not explain how naming the firms under investigation is at all relevant to this objective.'

l. The FCA's statement that enforcement action's 'greatest impact is deterrence' is not evidence-based. We do not believe the FCA has made a clear and objective assessment of the size of these deterrent effects, either in absolute terms or in relative terms. This makes it hard for the FCA to know where it should focus to have the most impact on consumer protection. Furthermore, the FCA has not provided any evidence that an announcement of the nature outlined in CP24/2 will deter others from carrying out the same activity that is the subject of the investigation. We believe deterrence should be achieved through the punishment for wrongdoing, including publicity of that punishment (indeed the FCA Decision Procedure and Penalties manual makes clear that the principal purpose of penalties is to deter wrongdoing (see 6.1.2)). It should not extend to harming firms who have yet to be found to have committed any wrongdoing and should therefore benefit from a presumption of innocence.

m. While an announcement will cause significant harm to parties who are named, the actual deterrence effect this will have on third-parties is unclear. Since the FCA will not have reached any provisional or final conclusions at that stage, other market participants will not know if and how they should alter their conduct or activities. At the same time, the likely assumption by the market and media that there has been wrongdoing might result in some market participants feeling the need to take premature and unnecessary/counterproductive action to protect their reputations and relationships, potentially incurring significant unnecessary costs. Indeed, the proposed announcement could have the primary effect of just creating confusion amongst firms and customers, which again is further compounded by the length of time FCA investigations take.

n. An announcement of enforcement action may well lead to a sudden rise in complaints and referrals to the Financial Ombudsman Service (FOS), such that the subject will be impacted by (i) resource needing to be dedicated to liaising with the FOS (ii) extra resource needed to administer complaints (iii) potential additional burden of FOS fees, and (iv) financial loss associated with lack of consumer confidence and withdrawal of business. Given the length of investigations, this financial and administrative burden could continue for a prolonged period of time, with the risk that the business will fall into financial distress. Announcements by the FCA could also risk fuelling speculative litigation or complaints by Claims Management Companies (CMCs) and other bodies, and the process of resolving those will be costly for firms. Complaints are likely to be without sufficient merit, and risk raising customer expectations that they will be upheld. If/when they are subsequently not upheld, this risks undermining customers' trust in firms and the FCA.

o. To the extent the FCA's proposals are motivated by a desire to ensure that harmful conduct is promptly addressed, seeking to coerce such behaviour through the threat and harm of publishing a firm's name is not the right way to go about it. The FCA already has powers to address this that would not necessitate the publication of the name of a firm under investigation – including powers to impose an "Own Initiative Requirement" under Part 4A (section 55L) of Financial Services and Markets Act 2000 (FSMA 2000) which may take effect on a date of the FCA's choosing (section 55Y). These powers are rightly subject to a statutory process for the imposition of such requirements to, among other things, protect the rights of regulated entities. It would not be proper for the FCA to circumvent these protections by publishing the names of a firm under investigation to try and achieve the same effect.

p. FSMA 2000 contains a detailed legislative framework which addresses publicity in relation to the FCA's enforcement activity. Section 391 creates a specific statutory framework for the publication of warning notice statements, decision notices and final notices. There is no provision empowering the FCA, on a statutory basis, to disclose the commencement of an FCA investigation – in contrast to the CMA, which is specifically empowered to disclose the commencement of investigations by section 25A of the Competition Act 1998. Even with this statutory power, the CMA's practice is to give minimal public information about its investigations. Further, section 348 FSMA 2000 prohibits the FCA from making public "confidential information" (which includes information relating to the business or affairs of another person received by the FCA for the purposes of or in discharge of its statutory function). Indeed, the FCA has historically and until now cited section 348 FSMA 2000 as precluding it from commenting on new or ongoing investigations, the FCA has not adequately explained why it has now changed its view.

q. We do not consider that the FCA has thoroughly approached the concept of transparency in relation to alternatives that could equally serve its objectives of reassuring and educating firms and consumers (see above for examples of alternatives). The stated approach of the FCA[8] is informed by 'the guiding principle that the presumption should be towards transparency'. The public interest framework does not reference this guiding principle, nor appear to consider its

[8] https://www.fca.org.uk/publication/feedback/fca-transparency-framework.pdf

possible weighting or impact on how decisions will be made on a case-by-case basis. We believe the FCA should carefully consider this as part of assessing responses to their proposals.

r. We understand that in developing its proposals the FCA considered the fact that a listed firm is already required to make a market disclosure if it feels the fact of an FCA enforcement investigation is likely, in itself, to affect its share price. A listed firm is subject to a particular set of rules in addition to any regulated business it may undertake. The listing rules serve a particular purpose and the FCA appears to have conflated the requirements of the listing rules, which are very different in nature, to what is being proposed, with its approach to enforcement in order to develop one broad brush set of proposals. However, this would not work in practice. For example, complying with the listing rules (including disclosures in annual reports and prospectuses etc) takes a lot of time to prepare, which is in stark contrast to the FCA's proposal to give firm's one day's notice ahead of publishing an announcement.

s. Additionally, there seems to be little consideration of the market sensitivities associated with announcements. We have seen several instances over the years where FCA announcements or communications have 'moved markets'. Any announcement, even those in the public interest, would have to be measured against the potential to impact share prices etc. Commonality in business model or products mean any announcement regarding a firm, individual or sector, is likely to have market wide impacts… if no subsequent fines or censure result, this feels disproportionate and contrary to the FCA's objectives regarding efficient and functioning markets. The FCA has indicated that any announcement would normally state that the investigation should not be taken to imply that any conclusions of misconduct have been made. However, this will not address the harms outlined above. In our experience, such caveats will not be effective at preventing adverse media and public commentary, impacts on share prices, reputational impact and capital outflows. The mere existence of the announcement can trigger customer and shareholder complaints and litigation prior to an investigation being favourably concluded.

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?

No. We do not agree with the structure or the content of the proposed new public interest framework.

a. There is no evidence to support the FCA's assertion that including the identity of the subject of an investigation would influence any of the factors that the FCA puts forward in its proposed public interest framework. It is particularly concerning that 'addressing public concern or speculation' is a factor the FCA proposes to consider, when naming a firm. Public concern or speculation is clearly not a sufficient basis to name and shame a firm, before any evidence of wrongdoing has been established and surely does not override Article 6 ECHR considerations. Indeed, this is contrary to the stated aim of the FCA as set out in a recent speech[9] by its chief executive who noted '…we aim to act proportionately, based on evidence. To collect more if we need it.' Moreover, given that the complaint statistics from the FOS are regularly published, if a

[9] https://www.fca.org.uk/news/speeches/investing-outcomes-regulatory-approach-deliver-consumers-markets-and-competitiveness

consumer has concerns about a potential product, service provider or firm, it can use the complaint information from FOS to identify (a) what is the product complained of (b) how many complaints have been issued against a particular firm (c) how many of those complaints have been upheld by FOS.

b. Furthermore, the FCA, by its own admission in CP24/2, has not considered the potential impact on its investigation subjects as a specified factor in its proposed framework. The way in which this is set out in CP24/2 demonstrates a seeming lack of understanding of the potential impacts on firms, their employees, as well as their customers, and the reputation and stability of the UK as a financial centre. Further information on these points can be found in our response to question 1.

c. Furthermore, in its engagement with industry on this consultation, the FCA has suggested that it believes under its proposed public interest test, the majority of cases would be announced at the start of the process. This is concerning for all the reasons outlined above. It also suggests that the FCA is proposing a presumption in favour of announcing before it has considered the circumstances of each case.

d. While we strongly disagree with the proposals, if the FCA insists on taking them forward, the criteria regarding what the FCA deems to be in the public interest needs to be much more clearly and tightly defined. Appropriate safeguards and controls should be in place for the functioning of this new power to announce investigations, and it should be made clear that the proposal to publicise an investigation is not used as business as usual, but something that should only be used in exceptional circumstances. The public interest test should still be balanced with a set of factors which the FCA considers indicating that an announcement or update may not be in the public interest, such as negative impacts on consumers, risk of damage to the subject, and damage to individuals should they be identified. Firms should have an adequate opportunity, before the FCA takes a final decision to name them, to make representations to the FCA on these negative impacts and to appeal any such decision. This would help regulators take a proportionate approach to publication, balancing competing considerations as judiciously as possible.

e. Again, while we remain opposed to the proposals in this consultation, should the FCA decide to take forward these proposals, we would urge the FCA to consult further on any revised public interest test to ensure that its proposed approach is properly tested and understood by the market.

3: Do you agree with our approach to announcements and updates where the subject is an individual?

Yes. While we remain opposed to the overall package of proposals contained within CP24/2, we agree with its proposal that it would not name individuals under investigation.

a. However, it is important to note that individuals under investigation may still be identifiable, even if the FCA does not publicly disclose their name. For example, there will be instances where even if the subject of an announcement is a firm, the firm's name may contain, or indeed be, the name of an individual. A search of the FCA's Financial Services Register conducted on 21

March 2024 found seventy-five firms matching the name 'Jones' within ten miles of London. Some of those involved a first name and the surname Jones.

b. If the FCA proceeds with its stated proposals to name the subjects (firms) of investigations as set out in CP24/2, it is entirely possible that individuals' identities could be easily discovered by looking at a firm's website or utilising records at Companies House. In the event an announcement is made containing the subject of an investigation, there is a real risk that individuals within that subject (firm) may be identified by parties with malicious intent – potentially to cause financial (or other) harm and/or to defame their individual and/or firm reputation.

c. The FCA does not appear to have considered this when developing the proposed approach set out in CP24/2. This is another reason why we believe the proposals are fundamentally flawed and should not proceed.

4: Do you agree with the proposed content of our announcements?

No.

a. The fact that the FCA says its announcements will 'make clear 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 unless it is inappropriate to do so' will not achieve the FCA's intended objective of clarity. As outlined above, firms will be tainted and presumed by many to be guilty before an investigation has been completed.

b. As we note above, there is a real danger of significant reputational damage to firms, and to individuals whose lives may be seriously impacted, if publicly 'named and shamed' as subjects of investigations, even if they are subsequently exonerated on any wrongdoing. Experience suggests that announcements of corrections or exonerations do not gain as much media attention as announcements of investigations or perceived wrongdoing.

5: Do you agree with our proposed methods of publicising an announcement and updates?

No.

a. We do not agree with the proposal to publicise announcements. Nor do we agree with the proposed methods of publicising such an announcement and updates. We do not believe that the proposal to give the subject of an announcement one business day's notice is remotely sufficient. A significant amount of activity is necessary to prepare for such an announcement and, as noted above, the FCA has not considered the impact on the subject, either in reputational, financial or resource terms. Whatever the amount of time given to firm to prepare for the announcement, it is clear that any announcement will have negative impacts on the firm. More broadly, the FCA has not fully identified how it will approach the timing of an announcement if an investigation subject is listed in multiple jurisdictions.

b. The FCA adopts a phased approach to seeking information and/or documents in investigations where it allows time (no more than three business days) for a subject to consider the information requirements and comment on the practicality of providing the information or

documents by the proposed deadline. The FCA will then confirm or amend the proposed deadline. We recognise that this example applies to an investigation rather than an announcement of an investigation. However, the reality is that the subject of an announcement will likely need to undertake significant internal activity in response to any FCA notification of an investigation, so giving one day's notice is not sufficient.

6: Do you agree with our proposed approach to publicising investigation updates, outcomes and closures?

No.

a. As noted above in our response to question 1, the proposal to publicise investigation updates, outcomes and closures raises significant concerns about the impact of these on investor confidence, the value of firms and the functioning of markets. The credibility of the FCA's proposals is significantly impacted by the statement that they have not considered the potential impact on its investigation subjects as a specified factor in its proposed framework. We believe the proposals could unjustifiably harm the business interests of firms and undermine the UK's competitiveness as an international financial centre.

b. Given the complexity and length of investigations, we do not think it is justifiable that the subject of an investigation should be exposed to ongoing reputational damage. This is underscored by the fact around 65% of the FCA's investigations end with no action being taken.

c. It should be noted that the FCA already has powers to publish Decision Notices, which include details of the subject and the penalties imposed upon them through enforcement action.

7: Do you agree with our proposal that moving our strategic policy information to the website will make information more accessible?

We do not consider investigation opening criteria or the Enforcement Information Guide as high-level strategic policy information. It is not clear why moving this content would make it any more accessible than it currently is.

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

Not applicable as we opposed the proposals in their entirety.

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

The EG should be a one-stop comprehensive resource setting out all powers relevant to enforcement. This includes reference to other powers the FCA may use alongside its investigation and enforcement powers. The alternative of relocating these elsewhere would be sub-optimal as a user would have to navigate a multitude of links and sites.

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

Not applicable as we opposed the proposals in their entirety.

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

Not applicable as we opposed the proposals in their entirety.

12: Do you agree that the present chapter 8 of EG should be moved from EG and included in SUP 6?

We agree that describing the FCA's powers in one place is sensible as it helps users navigate what is an already complex website more effectively (see our response to question 9 above).

13: Do you agree with the removal of the restitution chapter from EG?

Removing the restitution chapter could result in a user of EG being unaware that restitution is a possible enforcement action that the FCA could take. The foreword to CP24/2 states that the greatest impact of enforcement action is deterrence. Any possible deterrence effect the EG has (noting our earlier point on the lack of evidence regarding enforcement's deterrence effect) would be impacted as a result of removing this chapter.

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

The proposed retained material appears to have been streamlined as compared to the current EG, which is welcome.

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?

a. We think that private warnings remain a useful tool for the FCA and can act as a clear remit for action/avoidance of certain behaviour which should be part of the enforcement tools. It allows remedial action/behaviour to be taken immediately with minimal cost and resource both to the FCA and the person/firm receiving the warning. The removal of it ratchets up immediately the cost, time and potential damage.

b. It is not clear what the proposed approach to giving feedback 'in correspondence' or 'through wider industry engagement' would achieve as an alternative to using private warnings. A private warning, as described in the existing EG, requires that 'the FCA identifies and explains its concerns about a person's conduct and/or procedures, and tells the subject of the warning that the FCA has seriously considered formal steps to impose a penalty or censure'.

c. The existing EG describes how private warnings are utilised as an enforcement tool and can help inform possible future action. Retaining private warning as an enforcement tool may therefore help to speed up investigations and enforcement actions, which is one of the stated aims of CP24/2.

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

We do not consider that the proposed approach to future consultation is transparent. To promote transparency, we recommend that future changes to the EG are subject to consultation, and with

appropriate time given for responses. We would also ask for more evidence and data – and a thorough cost benefit analysis - to be provided as justification for the new proposed actions and powers to enable a properly informed debate.