

Insights

THE FCA'S UPDATED 'NAMING AND SHAMING' PROPOSALS

A "SOLUTION LOOKING FOR A PROBLEM"?

Nov 28, 2024

SUMMARY

The FCA has today published a further consultation paper (CP24/2 (Part 2)) in relation to its 'naming and shaming' proposals (the "**Updated Consultation**"). The publication follows widespread industry criticism of the FCA's initial proposals published in February 2024 (the "**Original Proposal**"), and an intense grilling earlier this month of the FCA's Nikhil Rathi and Ashley Alder before the House of Lords Financial Services Regulation Committee over the proposals.

The FCA has, as anticipated, significantly watered-down its Original Proposal in the Updated Consultation and has also provided some case studies to demonstrate how its revised proposals might have applied to past investigations. So, what does this all mean and what happens now?

WHAT ARE THE KEY CHANGES TO THE FCA'S ORIGINAL PROPOSAL?

PUBLIC INTEREST TEST AMENDED TO INCLUDE IMPACT ON THE FIRM

In respect of the **public interest test** that the FCA proposes to use to decide whether to make an early announcement, the FCA now acknowledges that **the impact of an announcement on the firm under investigation should be a specified factor that it must consider**. This is in direct contrast to the position in its Original Proposal, where it made a point of stating that the impact on the investigation subject would *not* be a specified factor. The FCA pitches this change as a clarification of its position, but many will see it as a climb-down. Whatever the case, one of the key concerns with the FCA's Original Proposal was that firms' interests could be ignored in applying the public interest test, and so this change is very significant.

The FCA now also proposes to add a further specified factor requiring it to consider whether a proposed announcement would "***seriously disrupt public confidence in the financial system or the market***".

NOTICE PERIOD EXTENDED

The FCA has also revised its Original Proposal to provide firms with an unrealistically short one day notice period before making an early announcement. It now proposes to provide firms with a copy of any draft announcement and **10 business days' notice to make their representations, with a further 2 business days' notice of publication of any announcement** if it decides to proceed after taking such representations into account. It also says that any decision to announce will always be made at Executive Director level.

CLARIFIED PROPOSALS APPLY PROSPECTIVELY

The FCA has confirmed that **its proposals will not apply retrospectively and will not, therefore, apply to existing ongoing investigations**. In other words, the proposals, if implemented, will relate only to proactive announcements of investigations commencing after they come into effect. The FCA's current "exceptional circumstances" test will remain applicable to any potential proactive announcements in existing investigations.

WHAT ABOUT THE FCA'S STREAMLINED ENFORCEMENT APPROACH?

As well as making the above significant concessions in respect of its naming and shaming proposals, the Updated Consultation includes some equally important insights into the FCA's enforcement approach going forward. As foreshadowed by the FCA for several months, and particularly in the recent House of Lords committee hearing, the FCA is now in the process of seeking to streamline its book of enforcement cases.

In the Updated Consultation, the FCA states that its number of open enforcement cases has decreased from 220, on 1 April 2023, to 147, by 28 November 2024. The FCA also expressly states that it has "*raised the bar for opening an investigation*" and strengthened its pre-investigation triage processes, so that it will now consider:

1. Whether an investigation is likely to drive impactful deterrence across the industry.
2. Whether it can use other tools to stop and reduce harm, rather than opening a formal investigation.

The upshot is that the FCA now expects that it will be opening **10-12 enforcement investigations into regulated firms per year**. That, in itself, is a significant shift in regulatory approach.

Historically, the FCA has used its enforcement powers as a diagnostic tool, opening investigations to explore whether misconduct has occurred and then closing them where sufficient evidence is not found. An approach that has driven the now well-known statistic that 65% of the FCA's investigations are closed without further action. Going forward, the FCA will be leaning more heavily

on its supervisory powers to deal with potential misconduct, with only a small fraction of cases making it to the enforcement stage. Indeed, we are already seeing this in practice.

Circling back to its naming and shaming proposals, the FCA anticipates that, because of the more confined pool of cases it will be taking to the enforcement stage in future, these proposals will drive only a “small” number incremental proactive early announcements each year. During the [recent House of Lords committee hearing](#), it estimated that there would be 2 to 3 such incremental announcements per year. For that reason, the FCA now asserts that its Original Proposal had been misunderstood and that its naming and shaming proposals are in fact only “*an incremental shift in current practice rather than wholesale change*”.

WHAT ARE THE NEXT STEPS?

Considering the watering-down of the FCA’s proposals and its suggestion that they will only impact a small number of investigations each year, it is questionable how far they now actually take it beyond its existing policy of making early announcements of investigations in “exceptional circumstances”. A question the FCA attempts to deal with head-on in the Updated Consultation. As one member of the House of Lords Financial Regulation Committee put it, they do now appear to be a “solution looking for a problem”.

That said, whilst there have been important concessions made by the FCA, the proposals still give rise to issues that require careful consideration. For example, whilst it is much welcomed that the FCA has acknowledged it must consider the impact on firms in its public interest test, its focus in the Updated Consultation does appear to be on the impact on smaller firms. One concern is that, for larger firms, the FCA will routinely take the view that they can ‘absorb’ the impact and, therefore, that other factors will always weigh in favour of making an early announcement. In addition, because the FCA is currently premising its proposals on a more streamlined approach to enforcement, there may need to be more concrete assurances given to the industry that the proposals will be revisited if the FCA reverts to a more expansionist approach to enforcement in future.

The FCA requests comments on the Updated Consultation by **17 February 2025**. BCLP will be working with financial services firms to prepare representations. For our submission regarding the FCA’s Original Proposal see [our insight](#). Please contact the authors of this blog if you would like to discuss the FCA’s proposals and what this might mean for your firm.

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