THE FCA'S PART 2 OF ITS "NAME AND SHAME" PROPOSALS: WHAT YOU NEED TO KNOW

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On 27 February 2024, the Financial Conduct Authority (FCA) published its Consultation Paper CP24/2, which revealed the FCA's new intended approach to publicised enforcement action. This was quickly dubbed the “name and shame” plan, and experienced extensive resistance across the market.

As a result of the widespread feedback received on the initial consultation, in November 2024 the FCA released its follow up Consultation Paper CP24/2, Part 2 (the Consultation Paper) on its proposals for greater transparency of enforcement investigations. The Consultation Paper outlines the FCA's engagement with responses to its initial proposals and seeks to reiterate its reasoning for the proposed changes.

Whilst the FCA accepts that its initial “proposals came as a surprise and [it] should have introduced them in a better way”, the Consultation Paper seeks to refine and clarify many of the proposals to assure the wider market of their intended benefits. Overall, the FCA has stated that it hopes the proposals will more effectively serve the public interest in only a small number of cases.

There is an opportunity for interested parties to provide feedback on the consultation by responding to the FCA's online questionnaire. The deadline to respond is 17 February 2025.

THE MAIN CHANGES TO THE FCA'S PROPOSALS

The FCA has proposed four main changes to the proposals. They are as follows:

- Expanding the public interest test to include the impact of an announcement on a firm. This would be a key factor when considering whether to announce the investigation or name the firm.
- Providing firms with 10 days' notice before an announcement is made, as opposed to the one day's notice as originally proposed, in which time firms could make representations to the FCA. A further two business days' notice would be allowed if the FCA decided to announce the investigation.
- Expanding the public interest test to include the possibility of an announcement seriously disrupting public confidence as a new factor of consideration.
- Clarifying that the FCA will not announce investigations that have begun before the proposals come into effect. If, however, there is an ongoing investigation that is already public knowledge, the FCA will be able to confirm such an investigation is ongoing.

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HOW MIGHT THE PROPOSALS WORK IN PRACTICE?

The FCA has explained that it intends to take decisions in stages, depending on “what is reasonable and proportionate.”

First, the FCA will decide whether an announcement of an investigation would be in the public interest. It will consider the impact on those under investigation and the overall impact on the market. It also intends to remove the general reference to “otherwise advancing one or more of our statutory objectives” as a factor of consideration.

Secondly, when deciding at what point to make the announcement, the FCA will take into consideration a variety of factors, such as whether the information is already publicly available, whether it could proactively announce or reactively confirm an investigation, and at what point reassurance, harm minimisation or education would be most effective. It has been suggested that the three-month point of an investigation is the earliest stage at which making an announcement would be contemplated.

Last, with regards to what might be announced, the FCA has stated that it would carefully deliberate the content of an announcement and assess whether naming the firm would be in the public interest.

IMPACT ON FIRMS

Whilst the FCA has attempted to address wider concerns raised by respondents about impacts to firms' ongoing viability, market value and share price, and the adverse impact on competitiveness, the proposals still retain the underlying principles many objected to at the time of the FCA's first consultation.

The FCA has tried to argue that many investigations already end up in the public domain, often as a result of firms having to disclose investigation as part of their wider disclosure requirements. However, the vast majority of firms under investigation by the FCA are not listed and do not have wider disclosure requirements.

The FCA seeks to dissuade concerns on the impact of share prices, pointing out that it is not possible to assess the impact of an announcement on share prices in isolation, as there are multiple factors that can cause share prices to move. This appears to be self-serving and whilst the announcement of the conclusion of an investigation can have a positive impact on a company's share price, an open ongoing investigation will almost inevitably have a detrimental impact.

The FCA has also sought to argue that such announcements would act as an educational opportunity for firms to learn from and adapt their conduct to be in compliance, thereby fostering a competitive and credible market environment. This not only suggests an assumption at the outset that there are things to learn from any firm under investigation relating to its presumed misconduct.

This highlights that the presumption of being innocent until proven guilty is not something the FCA supports, contrary to well-established legislation and judicial precedent. This was an issue raised by many in response to the FCA's first consultation, highlighting that the key objections to the FCA's proposals remain.

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NEXT STEPS

Whether the Consultation Paper's attempts at assurance prove effective at curtailing market concerns remains to be seen. However, it is clear from the Consultation Paper that the FCA still hopes to progress with its future approach to publicised enforcement action. Regulated firms should engage with the consultation and any industry bodies in relation to ensuring any objections are submitted to the FCA.

As stated, all responses to the Consultation Paper must be submitted to the FCA's online questionnaire by 17 February 2025. The FCA board is expected to decide on the new proposals by the end of the first quarter of 2025.

If you have any questions regarding the FCA's proposals as outlined in this alert, please do not hesitate to contact us.

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