

FRESHFIELDS

FCA publicity consultation – take 2: A solution to one of the FCA’s problems?

29 November 2024

The FCA yesterday published its [revised proposals](#) to publicise enforcement investigations.

Reactions to the original proposals both from industry and market participants and bodies, and from the highest levels of government, were almost universally negative. The revised proposals follow hot on the heels, in particular, of a difficult outing before the Financial Services Regulation Committee [on 13 November 2024](#), which saw Ashley Alder and Nikhil Rathi challenged on whether the FCA had “*blindsided*” stakeholders with the proposals (Lord Hill of Oareford); failed to display “*political empathy*” in reacting to the situation as it did (Baroness Donaghy); and acted in a “*rather command fashion*” (Lord Hollick), in relation to proposals which, overall, could be viewed as “*a solution looking for a problem*” (Lord Lilley).

Revised proposals

As such, it will be no surprise that the FCA’s revised proposals represent a climb-down in several key respects, and particularly in relation to:

- **A presumption in favour of disclosure:** The original proposals signalled a “*presumption in favour of transparency*” – i.e. towards announcement. The new proposals make clear that announcements are envisaged only in a “*small amount*” of further cases (albeit that the proposals “*could potentially double the small number of proactive announcements*” currently made (typically, 1 or 2 per year)).
- **The public interest test for disclosure:** The original proposals expressly stated that potential harm to the investigation subject would not be considered when deciding whether to announce. The new proposals make clear that the potential impact of announcement on subjects would be “*central*” to the consideration, with the potential impact on the financial system or market being a new factor in the test.
- **Notice of announcements:** The original proposals stated that investigation subjects would be given no more than one business day’s notice of announcement. The new proposals provide for 10 days’ notice (other than where that is not in the public interest), with a further two days’ notice if, following this, the FCA decides to go ahead and announce.

Disclosure also won’t be made in respect of existing investigations if/when the proposals come into effect (again, absent exceptional circumstances), and likely only, at earliest, at the “*3-month point*” of any further investigations, which is when the FCA undertakes a “*thorough review*”.

While these are useful concessions, stakeholders will wish to take time properly to consider the detail of the revised proposals and the data, analysis and case studies they contain, and particularly to assess

whether the proposals: (1) go far enough in establishing their fundamental policy justification (with the FCA now essentially relying on having itself historically interpreted its ability under FSMA to announce in 'exceptional circumstances' as being a very high bar); and (2) are reasonable and proportionate to that aim. In this regard, the FCA has declined to provide cost/benefit analysis (as requested by the Committee), but has provided further detail, which will again need to be considered, of how the implications of the proposals are expected to manifest, and to be safeguarded, in practice.

Wider context

More generally, stakeholders will be interested to see how: (1) the proposals, if enacted, fit into the FCA's wider agenda, which, as set out in the paper, is to reduce the number of its enforcement investigations, but to increase the number of enforcement outcomes, and to speed up those investigations which are taken forward; and (2) the FCA handles this next phase of what has proved to be a particularly contentious issue for a regulator which is currently under fire on many fronts. In particular:

- On 11 November 2024, the FCA **announced** improvements to its staff training and disclosure processes in the context of its enforcement investigations, in light of the Upper Tribunal's **decision** in *Seiler and others v FCA* [2023] UKUT 00133.
- The FCA has been under pressure in relation to motor finance issues, with: (1) the Court of Appeal's recent **decision** on the common law in relation to commissions contradicting the FCA's own regulatory standards, just while the FCA attempts in parallel to investigate any potential breaches of those same standards; and (2) the topic of better managing mass consumer redress issues firmly in the spotlight (see our colleagues' blog on the FCA / FOS call for input on FOS reforms, [here](#)).
- On 26 November 2024, the All-Party Parliamentary Group on Investment Fraud and Fairer Financial Services published **a 358-page report**, strongly criticising a number of aspects of the FCA, including an alleged lack of transparency and accountability.

Against this backdrop, it is understandable that the FCA has been considering what more it can or should say about its own activities. The FCA will be hoping that the revised publicity proposals provide a more palatable solution to at least part of that particular problem.

We previously blogged on the original proposals [here](#), [here](#) and [here](#). A **questionnaire** on the revised proposals invites comments by **17 February 2025**.