FSLA
financial services lawyers association

FCA CONSULTATION PAPER CP24/2 (PART 2)
FSLA RESPONSE

17 FEBRUARY 2025

Disclaimer: This response is submitted on behalf of FSLA and is intended to capture the overall weight of contributions received from its membership, but the views, thoughts and opinions expressed in this response belong to the individual authors of this paper (and not for example the author's employer, chambers, organisation, committee or other group or individual members of FSLA). For the avoidance of doubt, this paper does not contain the views of or purport to make any representations on behalf of any FSLA members who are employed by the FCA, the Bank of England (including the Prudential Regulatory Authority) or any other regulatory bodies.

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INTRODUCTION

1 The Financial Services Lawyers Association ("**FSLA**") is a voluntary association with more than 2,000 members who specialise in financial services regulatory work (both contentious and advisory). FSLA's objectives include:

"*… [providing] a forum for the open exchange of views and the dissemination of knowledge and ideas relating to financial services law and regulation…foster[ing]co-operation between the various financial services stakeholders including lawyers and policy experts in industry, academia, regulators and government*".

2 Our members have significant experience advising a wide range of financial services firms and individuals on how to manage enforcement investigations. Our member's expertise is based on our experience in private practice, in-house at financial institutions and experience working directly for the FCA (and other regulators). The organisation is thus uniquely placed to provide the FCA with pragmatic, informed and balanced feedback on the proposals detailed in the CP.

3 This response is informed by the contributions from our membership which have been principally gathered at an FSLA Roundtable "*FCA Consultation Transparency of Enforcement Investigations*" on 22 January 2024 (see **Annex A** for list of attendee firms and chambers). This response concerns the CP24/2 Part 2 which was published on 28 November 2024 ("**CP24/2 Part 2**").

4 This response should be read in conjunction with FSLA's response to CP24/2 dated 30 April 2024 (the "**First Response**") and our letter to the House of Lords Financial Services Regulation Committee ("**FSRC**") dated 11 October 2024, in response to a public Call for Evidence. For brevity, we have not sought to repeat the substantive comments outlined in the First Response, but where helpful have cross-refenced the relevant sections and adopted the definitions detailed in the First Response.

5 We also refer to the report issued by the FSRC on 6 February 2025 "***Naming and shaming: how not to regulate***" (the "**FSRC Report**"), the conclusions of which FSLA broadly supports[1]. We note that it is unfortunate that the FCA did not wait for the FSRC Report to be published prior to the publication of CP24/2 Part 2, as it would have certainly streamlined this process of consultation and review.

[1] FSRC Report dated 6 February 2025 "Naming and shaming: how not to regulate"

SECTION A – EXECUTIVE SUMMARY

1 Whilst FSLA strongly supports the FCA's stated objectives of transparency, consumer protection and the delivery of a more streamlined and effective Enforcement process, we do not consider that the Publication Policy would be a fair, legally sound or proportionate policy to pursue. The **FCA's aims and objectives could be achieved within the structure of its current regulatory toolbox** including: a less restrictive interpretation of the "exceptional circumstances" test in the Current Enforcement Guide; a more robust referral process (which is already in train and delivering tangible results); operational improvements to speed up the investigation process; and adopting a more transparent and proactive educational strategy (on an anonymised basis).

2 Despite some of the proposed amendments detailed in CP24/2 Part 2, FSLA remains of the view that the Publication Policy **goes further than what is necessary, legitimate and proportionate**. FSLA strongly believes that the Publication Policy is fundamentally inconsistent with the statutory framework which, in the FCA's own words, was *"specifically built into FSMA in order to prevent the casual, rash or unchallenged use by the regulator of public statements that could damage a financial services firm's reputation and commercial standing"*[2].

3 No amount of amendment to the finer details of the Publication Policy will mitigate the risks it could cause and FSLA must therefore support the conclusions of the FSRC and Lord Forsyth of Drumlean, Chairman of the FSRC who stated: *"It was incumbent on the FCA to make a strong and unequivocal case for why such a fundamental change was needed and it has failed to do that"*[3]. FSLA must agree that the FCA has failed to meet this threshold.

4 We believe that the FCA **has significantly underestimated the potential detrimental effect** of publication on investigation subjects (or third parties who are identifiable from FCA the announcement) and the extremely strong likelihood of damage to the subject's reputation and financial position (be it a firm or individual). FSLA also considers that the Publication Policy has not been articulated with the **necessary degree of legal clarity and certainty** required to implement a fundamental policy change of this nature.

5 We do not consider that the PI Framework and the decision-making process, as outlined by the FCA in CP24/2 Part 2, will result in **proportionate and consistent decision-making**. The Publication Policy does not deliver an appropriate amount of **independence or provide an effective appeal mechanism**, despite the fact that these mechanisms are already enshrined in the legislative framework for the issue of statutory notices by the Regulatory Decisions Committee (the "**RDC**").

6 FSLA considers that if the FCA does address the **critical legal challenges and concerns**, as detailed in Section C of the First Response, it should conclude that there are no good reasons for introducing the Publication Policy.

7 In the event that the FCA continues to push forwards with the Publication Policy, it is incumbent on the FCA to conduct a **Cost-Benefit Analysis** and provide evidence that this fundamental policy change will advance its objectives in such a manner which outweighs the severe detriment which would flow for investigation subjects (or third parties who are identifiable from the FCA announcement). It is also necessary for the FCA to provide a **detailed markup of the proposed amendments to the Enforcement Guide** (which includes other fundamental procedural changes to the Enforcement process - see Section F, paragraph 3.4).

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[2] FSA's 2008 Discussion Paper: "*Transparency as a Regulatory Tool*" ("DP 08/3")
[3] FSRC press statement, Lords report concludes that naming and shaming is not the way to regulate - UK Parliament

SECTION B – THE FCA AIMS AND OBJECTIVES

1 The central thrust of CP 24/2 Part 2 and the FCA's objective remains fundamentally unchanged from the first consultation CP24/2. The FCA wants to find a way to publish more information about its investigations at an early stage, which includes the identity of the subject firm. However, we do not consider that CP 24/2 Part 2 has done enough to substantively address the significant feedback, concerns and criticism from industry, policymakers and the legal fraternity. This view is clearly shared by the FSRC who concluded that:

"*The revised proposals…do not resolve the fundamental issue that by broadening the justification for proactively announcing investigations, it could increase the risk that investigations could be announced, reputational damage to firms could occur, media speculation could arise, but no regulatory action is ultimately taken. We remain unconvinced that the proposed public interest framework will allow for proportionate and consistent decision making over whether to announce an enforcement investigation early.*"[4]

The rationale

2 Whilst the fundamental outcome being sought by the FCA has not changed, the FCA's rhetoric has certainly shifted with the Publication Policy now being described as "*an incremental shift in current practice rather than wholesale change*"[5] and the FCA insisting that it does not represent a "*fundamental change in approach*".[6] The FCA's objectives are detailed at paragraph 1.9 of CP 24/2 Part 2:

2.1 by providing information on worrying conduct, the FCA would enable consumers to help prevent harm;

2.2 greater transparency will boost confidence;

2.3 greater visibility of investigations help the industry improve processes more swiftly;

2.4 improve own accountability given how regularly the FCA is asked about specific investigations by parliamentarians; and

2.5 encourage witnesses and whistleblowers to come forwards.

3 However, CP 24/2 Part 2 does not clearly articulate what has changed for the FCA:

3.1 from its unequivocal position, that FSMA included statutory protections which were "*specifically built into FSMA in order to prevent the casual, rash or unchallenged use by the regulator of public statements that could damage a financial services firm's reputation and commercial standing…it follows that calls by some for us to 'name and shame' firms as a matter of course is not the approach envisioned by Parliament and is not one we can readily meet under FSMA*";[7] or

3.2 how the FCA has got comfortable with the various legal challenges and hurdles it faces in introducing the Publication Policy which range from its obligation to regulate in a proportionate manner; the statutory confidentiality framework; the statutory notice framework and public censure regime; and human rights considerations.

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[4] Paragraph 115, FSRC Report dated 6 February 2025
[5] Paragraph 6.19, CP24/2 Part 2
[6] Paragraph 3.18, CP24/2 Part 2
[7] FSA's 2008 Discussion Paper: "*Transparency as a Regulatory Tool*" ("DP 08/3")

4 FSLA considers that if the FCA does address these critical legal challenges and concerns, as detailed in Section C of the First Response, it should conclude that there are no good reasons for introducing the Publication Policy and therefore it should not do so.

The amended Publication Policy

5 We recognise that the FCA has added a number of additional factors to the proposed Public Interest Framework ("**PIF**"), including the **impact of an announcement on the relevant firm** which would "*be central to our consideration of whether to announce an investigation and name a firm*"[8] and the potential of an announcement to **impact public confidence in the financial system or market**.[9] However, the relative importance or weighting of these factors is not directly reflected in the amended PIF – they remain just factors and are not decisive. See Section C for more detail on Process and Safeguards.

The statistics

6 CP 24/2 Part 2 seeks to reframe the Publication Policy within the wider context of the 42,000 firms regulated by the FCA, the size and scope of its current Enforcement portfolio (which we recognise has been significantly streamlined from over the past 18 months)[10] and a higher bar for enforcement referral (although the statutory test has not changed since the inception of the FSMA). It should be noted that the latter two points are generally influenced by the incumbent FCA management and are therefore not guaranteed to change again at some point in the future.

7 The FCA noted that it will generally open between 10-12 investigations into regulated firms each year[11] and therefore it expects that the impact of the Publication Policy would be "*small*" with only an "*incremental*" increase in the number of proactive named announcements.[12] However, this actually accentuates the significant impact that an FCA announcement would have: if you are the unlucky one of 12 annual investigations which is announced, you can expect that your customers, investors, suppliers, employees and other external stakeholders will assume the worst (i.e. that a negative Enforcement outcome will follow).

The FCA's Secondary Objective

8 As detailed in the First Response,[13] FSLA is concerned that the Publication Policy is fundamentally inconsistent with the FCA's secondary objective and would risk making the FCA an outlier amongst both domestic and global regulators.

9 Whilst FSLA supports the FSRC's conclusion that the FCA has not "*adequately demonstrated how the proposals contained in CP24/2 Part 2 align with its secondary international competitiveness and growth objective*",[14] we would urge caution in respect of the FSRC's recommendation that the FCA "*[e]ngage with HM Treasury over any future developments relating to its enforcement investigation proposals to ensure that they are aligned with the Government's view of the secondary international competitiveness and growth objective*",[15] in our view, it is for the regulator to assess and give weight to its secondary objective, and to decide how its secondary objective interrelates with its primary objectives, and how they contribute to developing its policy objectives and, ultimately, its decisions. We regard the independence of the FCA from the views of HM Treasury or indeed others as to its objectives

[8] Paragraph 1.20, CP24/2 Part 2
[9] Paragraph 1.20, CP24/2 Part 2
[10] Paragraph 3.3, CP24/2 Part 2
[11] Paragraph 6.18, CP24/2 Part 2
[12] Paragraph 3.18, CP24/2 Part 2
[13] Section C, paragraph 24 of the First Response
[14] Paragraph 122, FSRC Report dated 6 February 2025
[15] Paragraph 122, FSRC Report dated 6 February 2025

(on this as on any other policy issue) to be a valuable principle, which we would uphold even in circumstances where we disagree with the FCA's proposed conclusions.

SECTION C – PROCESS AND SAFEGUARDS

1 FSLA recognises that the FCA has been open to feedback from stakeholders since the publication of CP 24/2 and has, as a result, made a few changes to the PIF and to the Publication Policy. These changes are welcomed but, in reality and in practice, we do not consider that the FCA has addressed our serious concerns and the Publication Policy, as formulated in CP 24/2 Part 2, is still subject to significant weaknesses.

The process

2 Retrospective application: The decision of the FCA not to proactively apply the Publication Policy across its current Enforcement Policy, on a retrospective basis, is a positive development. However, it is important to note that the Publication Policy will still apply to cases (which pre-date the Publication Policy) in circumstances where the PIF is applied in the future and therefore this "concession" is somewhat limited in practical benefit:

"*Firms told us they were concerned about us applying our proposals retrospectively. So we are amending our proposals to make clear that we would only announce or update on existing investigations where the announcement would be reactive. That is, where the fact of the investigation is already in the public domain and it would be in the public interest for us to reactively confirm the fact of the investigation.*"[16]

3 Notice periods: We note the change from a single day's notice of an announcement (with no possibility for a subject to make representations) to the provision of "at least" 10 business days' notice of the prospect of a public announcement. We still consider that this remains a relatively brief period for a subject to be able to consider the true implications of publicity (including any meaningful assessment of market, customer or investor impact), take professional advice and make its representations to the FCA decision-makers.

4 Again, this "concession" by the FCA needs to be considered against the other (and arguably more critical) notice period – two business days from the decision being made by the FCA to make an announcement.[17] This notice period is exceptionally brief and, in practice, results in very little realistic prospect of a subject (or a third party who is at risk of being impacted through indirect identification) being able to mount a legal challenge to the decision itself (the detail of which would necessarily have to form the basis of any such challenge, be it through judicial review, injunction or otherwise) before the announcement is made and the genie is out of the bottle (in the event that any proceedings for privacy are denied or any judgment is made public).

5 Information provided: The FCA has now confirmed that the subject will be provided with a draft announcement[18] at the start of the 10-day notice period, but states that the subject will only be provided with a copy of "*our reasons*" after the FCA has considered the subject's representations and decided to announce (in the two-day notice period).[19] This would be unlikely to enable the subject to meaningfully engage with the FCA's reasoning and assessment of the PIF and consider what evidence or information might best inform the FCA's decision process. This approach is also inconsistent with informal briefings given by the FCA during this consultation period which suggest that the FCA will share a "*summary of its reasoning and assessment of the factors in the PI Framework*" at the start of the 10-day notice period (which, for the avoidance of doubt, FSLA would support). The FCA has also indicated that other documents might be created, such as an FAQs document for use by the Consumer Contact

[16] Paragraph 4.12, CP24/2 Part 2
[17] Paragraph 4.18, CP24/2 Part 2
[18] Paragraph 4.18, CP24/2 Part 2
[19] Paragraph 4.16, CP24/2 Part 2

Centre after an announcement, but it is not clear how these would fit within the process/timetable.

6 The FCA needs to describe and document in clear and unequivocal terms how the Publication Policy will operate in practice. Once again, we see a change of approach during the consultation process, which is inappropriate.

The safeguards

7 Decision-making: The FCA has confirmed that announcement decisions will also be made at "Executive Director" level[20] (although informally the FCA has stated that this process will only be undertaken by the Executive Directors of the Enforcement division for "consistency", which again is another point which the FCA must clarify). We do not agree that this is the correct forum for this decision-making process to be undertaken. In our view, the proper place for a regulatory decision with such potentially far-reaching and irreversible consequences is the RDC, to which a subject would be able to make proper and thought-through submissions. There is no reason why this process should unduly delay publicity if it is warranted: firms and those advising them are accustomed to responding rapidly in circumstances such as this, as is the RDC Secretariat. This would bring this decision-making process into line with the statutory decision process in place to issue Warning Notice statements (which only occurs once the FCA has reached a view that a breach has occurred and action should be taken).

8 Independent advice for the decision-makers: CP 24/2 Part 2 confirms that the decision-maker will be provided with "*information about any representations received, along with legal advice from an FCA lawyer who has not been part of the investigation team*". FSLA considers that it would be challenging for a truly independent legal opinion to be provided by an FCA lawyer in the General Counsel's Department or from another Enforcement lawyer unconnected with the investigation in question. As stated above, FSLA considers that this process should be run through the RDC Secretariat, which already has a mechanism in place to provide the members of the RDC with independent legal advice.

9 Governance: CP24/2 Part 2 confirms that the "*Board will keep the implementation of any revised policy under review*".[21] In the event that the Publication Policy is implemented (in any form), FSLA considers that it is important that there is a robust and transparent process for measuring the effectiveness of the Publication Policy and assessing that the PIF has been implemented in a fair and balanced way, which holds the FCA accountable. The FCA needs to describe and document in clear and unequivocal terms what governance mechanisms will apply to the Publication Policy, to ensure that independent challenge is appropriately applied. We have concerns about the FCA marking its own homework in this regard (as the decision to implement the Publication Policy sits with the same Board).

Amendments to the PIF

10 We welcome the expansion of and introduction of additional factors into the PIF[22] (both for and against publication). However, we do have a number of remaining concerns about the proposed approach adopted by the FCA.

11 Application of the PIF: The Publication Policy does not provide any indication of how much weight would be applied to the various PIF factors and this does not provide subjects (or their advisers) with enough guidance to understand how the framework will be applied in practice. As previously stated, FSLA considers that a Proportionality Framework would be more appropriate in these circumstances, as it will support a true balancing exercise to be undertaken.[23] Further, without any detailed weighting system in place, there will be no

[20] Paragraph 4.17, CP24/2 Part 2
[21] Paragraph 4.17, CP24/2 Part 2
[22] Paragraph 4.10, CP24/2 Part 2
[23] Section H, paragraph 7.1 of the First Response

meaningful way to measure and test the consistency of the FCA's decision-making over time. FSLA supports the conclusion of the FSRC that:

"*It remains unclear, however, what specific criteria would guide the FCA's assessment of 'public interest' or how the FCA would evaluate the impact that it now recognises the announcements may have on firms and financial markets. Questions persist around the levels of discretion the public interest test affords the FCA, how consistency in decision-making can be assured and how inconsistent outcomes would be avoided. Greater transparency in these processes is essential to ensure that firms and stakeholders have confidence in the fairness and consistency of the regulatory framework.*"[24]

Factors in favour of publication

12 Public concern and speculation: This concept exists within the current "exceptional circumstances" test and featured in CP 24/2 in similar terms which focused on the desirability of addressing public concerns. However, the amended PIF has effectively replaced this with an assessment of whether relevant information is in the public domain and, if it is, then an FCA announcement would be in the "public interest". We do not consider that it is appropriate to conflate these two concepts (see examination of **Case Study 2** below).

13 Consumer protection: Again, this concept exists within the current "exceptional circumstances" test and featured in CP 24/2 in similar terms. However, the revised proposals[25] from the FCA appear to lower the bar for publication, that an announcement is:

13.1 "***likely*** to be in the interests of…customers, consumers or investors";

13.2 "***likely*** to prevent direct or indirect consumer harm"; and

13.3 "***likely*** to be in the interests of creditors" (emphasis added).

14 FSLA is concerned that this approach significantly tilts the balance in favour of publication, without explanation as to why this change has been made and how the FCA might assess the "likelihood" of the benefits being delivered through publication. We would also note that this measurement of "likelihood" now appears across most of the amended PIF.[26]

15 Educational benefit: Similarly, a further factor which has been refined from "prevention" (as detailed in the "exceptional circumstances" test), "to deter future breaches" (as detailed in CP 24/2), has now been amended to focus on providing "*an educational benefit for firms and market users*". However, the FCA does not in any meaningful way explain why it has reframed this factor so significantly or why the same educational benefit to the wider public could not be achieved through the publication of anonymised information, thereby avoiding the extreme prejudicial risk of naming a subject firm.

16 Improve parliamentary accountability: This is the only factor in favour of publication which does not have a genesis in the current "exceptional circumstances" test and was not detailed in CP 24/2. The FSLA considers that the introduction of this factor, drafted in very broad terms that "publication would ***help*** improve...",[27] signals the main objective and driver for the FCA's desire to implement the Publication Policy (on the basis of the "public interest" test). It is the FCA who will be the main beneficiary of the Publication Policy.

17 FSLA is concerned that a PIF implemented for this purpose is fundamentally flawed and the FCA will find itself subject to undue pressures, triggered by public outrage or political scrutiny in high-profile matters (as demonstrated in **Case Studies 1 and 3**). FSLA does not consider that the FCA has demonstrated that the benefits of the Publication Policy outweigh the risks of

[24] Paragraph 115, FSRC Report dated 6 February 2025
[25] Paragraph 4.10, CP24/2 Part 2
[26] Paragraph 4.10, CP24/2 Part 2
[27] Paragraph 4.10, CP24/2 Part 2

undermining the statutory protections and the procedural checks and balances put in place by the legislature in FSMA. FSLA would invite the FCA to explore what other mechanisms could be used to improve parliamentary accountability without undermining these fundamental statutory protections.

Factors weighing against publication

18 Conversely, FSLA notes that the factors tending against publication have been drafted to impose a considerably higher bar for subjects to clear: the risk of "*serious*" market or sector impact; or a "*severe*" impact on firms or third parties who could be impacted by an announcement. The effect, whether or not it is the intention, appears to make it far harder to argue against publication than in favour of it, and makes this potentially a **binary factor** rather than ensuring that the FCA will consider the implications for a subject (or the market) in the round. As currently drafted, if the FCA (in its own subjective view) does not consider the impact to be "serious" or "severe", it would not need to consider these factors at all – this would appear to be potentially unreasonable and unjust.

19 Put differently, the way the PIF is now expressed in CP 24/2 Part 2 appears to some extent to retain some of the "exceptional circumstances" test which currently applies to an assessment on publication, but only when arguing against publication (which the FCA considers creates a higher bar).[28]

20 This highly unbalanced approach needs to be considered in the context in which the FCA has not provided a real and considered rationale as to why the present "exceptional circumstances" test should not remain workable. The problem with the test, in our members' experience, is not the wording so much as the FCA's approach to the definition of the word "exceptional" in such a way as to render it almost impossible to satisfy. The FSRC has reached the same conclusion: "*The FCA's explanation for how these proposals will further its objectives is unconvincing. It remains unclear why a broader interpretation of 'exceptional circumstances' could not be considered in place of the proposed public interest test, particularly where there is an immediate risk to consumers.*"[29]

Other comments on the PIF

21 Comparison with other regulators: As detailed in the First Response, FSLA did not accept the representation of the FCA that the Publication Policy would be "consistent"[30] with the publicity approach of other regulators (CME, OFGEM and MAS). This conclusion has been supported by the FSRC who have commented that: "*The FCA's assertion in its first consultation that its proposals would be consistent with approaches taken by other international regulators was* ***misplaced and misleading****. It is notable that it has changed the narrative on this, from* ***emphasising commonality*** *with other regulators in its first consultation, to* ***highlighting the uniqueness*** *of their remit in the second.*"[31]

22 The Publication Policy and approach of the FCA contrasts sharply with other analogous regulators. A good example here is the Payment Services Regulator ("**PSR**", a subsidiary of the FCA) who do not usually announce the commencement of investigations.[32] When considering any publicity of its enforcement actions, including the opening of enforcement investigations, the PSR will take into account a number of relevant factors[33] which include:

[28] Paragraph 3.19, CP24/2 Part 2
[29] Paragraph 44, FSRC Report dated 6 February 2025
[30] Paragraph 2.18, CP24/2
[31] Paragraph 88, FSRC Report dated 6 February 2025
[32] Paragraph 5.6, PSR Powers and Procedures Guidance
[33] Paragraph 2.71, PSR Powers and Procedures Guidance

22.1 whether publication would have an adverse impact on the party subject to the action being considered or taken which would be disproportionate to the benefits, considered in general terms, of publication;

22.2 whether any third party (a party other than one who is the subject of regulatory or enforcement action by us) would be identified through and may be prejudiced by publication; and

22.3 any other issues related to fairness.

23 Further, any such announcement made will generally not include information which the PSR considers to be commercially sensitive.[34]

[34] Paragraph 2.70, PSR Powers and Procedures Guidance

SECTION D – CASE STUDIES

1 We have examined the case studies detailed by the FCA in Chapter 5 of CP24/2 Part 2. Whilst there are undoubtedly factors which positively weigh towards an investigation announcement under the PIF, we have concerns about the conclusions reached and the application of the PIF factors. We are concerned that the example cases selected by the FCA fall short in demonstrating a clear public interest in publication and the problems with the FCA's approach in these cases illustrate the problems with the PIF more generally. They are cases where:

1.1 publicity would assist the FCA to respond to parliamentary and public scrutiny (BSPS and PwC);

1.2 the information was already in the public domain (CGM);

1.3 other regulators had already announced public action, thereby leaving the FCA feeling pressure to show its teeth (PwC, CBPL); and

1.4 the FCA had failed to use its other supervisory powers at an earlier stage (CBPL).

Case Study 1 – British Steel Pension Scheme ("BSPS")

2 The PIF factors listed by the FCA include:

PIF factors in favour of announcement	**PIF factors against announcement**
"*We could have alerted BSPS members to potential problems with the advice they had been given.*"	"*Some of the firms involved were relatively small and they, and their staff, could be significantly affected by announcing and naming them.*"
"*An announcement could have provided reassurance given widespread public concern.*"	"*All the firms under investigation already had substantial public restrictions placed on them.*"

3 The FCA then concludes that it would have been in the public interest to announce its investigations into named firms who gave financial advice to members of the BSPS. Contrary to the submissions made by the FCA to the Public Accounts Committee, we do not agree that this was a case of **preventing customer harm**. The advice had already been given, so the only factor weighing in favour of naming the relevant firms under investigation would have been to **reassure customers** who had received problematic advice from those firms. However, historic and potential customers would already have been aware of the FCA's concerns due to the public restrictions already placed on the firm (as referenced in the draft announcement text "*All of these firms are already restricted from giving further transfer advice*.").

4 There is also no evidence that the FCA has grappled with the counter-implications for customers of firms that were not under formal investigation. Not all the firms who had provided problematic advice to members of the BSPS (which totalled hundreds of firms who were later subject to the redress scheme) were subject to investigation. The specimen announcement could have had the perverse effect of (mis)leading other members of the BSPS into believing that the FCA had no concerns about the other firms who had given problematic advice to the members of the BSPS but were not subject to an investigation.

5 The FCA could have achieved its **customer reassurance** objective (and arguably did) without a named announcement by using its existing tools including:

5.1 placing public restrictions listed on the FCA register to provide information to customers and market participants;

5.2 publishing a general statement in 2017 that the FCA was conducting a large number of ongoing investigations around the financial advice given to BSPS members; and

5.3 pursuing a number of supervisory initiatives[35] including hosting seminars with financial advisers to improve quality of advice and publicly reporting that a number of firms had decided to stop giving DB transfer advice.

6 Once again, it is the FCA's narrow approach to the "exceptional circumstances" test – which already exists within its regulatory toolbox which hampered its ability to publicly confirm the specific investigations being conducted: "*So, while the scale of the BSPS scandal was exceptional, each firm investigation was not. Had we announced all the investigations we opened, we would have announced significantly more than we have generally done under our existing policy…taking us out of the 'exceptional circumstances' threshold.*"[36] We do not agree that it would have been inappropriate for the FCA to view this portfolio of investigations together in a thematic manner when considering the "exceptional circumstances" test, as they are clearly linked from a customer perspective. Even under the "exceptional circumstances" test, it is not clear whether an announcement would have been appropriate having regard to the potentially perverse and misleading outcome set out in paragraph 4 above.

7 It is also not clear how the FCA would assess any representations of impact on the firm, which it expressly recognises might apply here as these were small firms whose staff could be "*significantly affected*".[37] It is unclear in what circumstances or evidence would convince the FCA, as part of a PIF assessment, to decide against making an announcement due to the impact on the firm. Whilst we understand that these assessments will always be highly fact-sensitive, the PIF lacks detail to provide sufficient guidance to the market and, in any event, the different ways "public interest" can be interpreted means that any decision-making is highly likely to be unpredictable and inconsistent. This concern is supported by the FSRC Report which concludes that: "*We remain unconvinced that the proposed public interest framework will allow for proportionate and consistent decision-making over whether to announce an enforcement investigation early.*"[38]

Case Study 2 – Citigroup Global Markets Limited ("CGM")

8 The PIF factors listed by the FCA include:

PIF factors in favour of announcement	**PIF factors against announcement**
"*An announcement that we were investigating would have reassured investors and other market participants that we took these incidents very seriously, helping to maintain trust and confidence. And it would have brought clarity and helped to address any speculation.*"	"*We do not think in these circumstances that the existence of an investigation would have been a surprise to market participants.*"
"*Information about the issue was already in the public domain. CGM had publicly referred to its role in the trading incident and our potential involvement was assumed.*"	

[35] https://www.fca.org.uk/news/statements/fca-updates-work-financial-advice-given-members-british-steel-pension-scheme
[36] Paragraph 5.7, CP24/2 Part 2
[37] Paragraph 5.10, CP24/2 Part 2
[38] Paragraph 115, FSRC Report dated 6 February 2025

9 On first appearances, an announcement naming CGM would appear to be uncontentious. However, on closer examination the FCA's analysis of the PIF factors seems to be **unduly influenced by the fact that the subject matter was already in the public domain**. That fact alone does not mean that an announcement by the FCA would have been in the public interest and it would appear that the FCA is conflating these two points.

10 Shortly after the trading incident occurred, CGM made an announcement to the market confirming that it had caused the incident. There is no evidence to suggest investors or other market participants needed reassurance or had lost trust in the markets due to the incident (as the FCA itself acknowledges: "*Flash crashes are not particularly rare; this one was brief and CGM almost immediately announced its trading error*.").[39] So, on that basis, there was no discernible public concern, speculation or rumour that the FCA needed to address by confirming that it was investigating CGM and its announcement would not have "*reassured investors and other market participants*"[40] as, in the FCA's own words: "*We do not think in these circumstances that the existence of an investigation would have been a surprise to market participants*" (and it is unclear whether this weighs in favour of or counter to public interest, as arguably it added no value to the public debate other than showing the FCA "was on the job").

11 The FCA could have taken other steps to deliver a quick message to the market about the systems and controls issues at CGM to achieve its educational objective ("*An announcement could have acted as a reminder for firms of our expectations in managing risks from trading, as well as a prompt to assess their own systems and controls*")[41] either with a general press release or a Dear CEO letter to the sector.

Case Study 3 – PricewaterhouseCoopers LLP ("PwC")

12 The PIF factors listed by the FCA include:

PIF factors in favour of announcement	**PIF factors against announcement**
"*There was significant public concern, both into the suspected fraud at LCF and the associated responsibilities of its auditors, both before and after the FRC's announcement.*"	"*PwC would have been able to make representations to us on whether an announcement would cause disproportionate harm to it or its individual staff, which we would have carefully considered before reaching a decision.*"
"*Announcing our investigation into one of those auditors could provide reassurance to consumers, investors (including potential fraud victims) and the public that we were investigating matters alongside our regulatory partner, the FRC.*"	
"*The Financial Reporting Council (FRC), in line with its routine approach, had previously announced it had opened an investigation into audits of LCF by PwC and two other named firms.*"	

13 We do not agree that this announcement would have provided reassurance to consumers, investors or fraud victims. These stakeholders were not focused on the issue which was the subject of the FCA investigation – namely, the failure of PwC to notify the FCA of its suspicions concerning London Capital & Finance ("**LCF**") in a timely manner. Instead, the proposed announcement of the FCA could have confused the public:

13.1 into thinking that the FCA investigation concerned the quality of PwC's audit work (which is the sole remit of the FRC). The proposed announcement does not provide

[39] Paragraph 5.15, CP24/2 Part 2
[40] Paragraph 5.16, CP24/2 Part 2
[41] Paragraph 5.16, CP24/2 Part 2

enough information to confirm the scope and focus of the investigation, instead simply stating the investigation concerned PwC's "*connection with its role as auditor of London Capital & Finance*"; and

13.2 into believing that PwC was somehow involved in the fraud undertaken by LCF, which could have caused significant reputational impact for PwC and undermined public confidence in auditors generally.

14 The primary concern of consumers, investors and the public centred on whether the FCA (belatedly) was investigating LCF's misconduct. The FCA made its investigation into LCF public. There is no basis to suggest that there was significant public concern about the responsibility of PwC to report to the FCA. The only stakeholder focused on auditor reporting in the context of LCF was the FCA (in the context of Dame Gloster's independent investigation) and any announcement would only have served its self-interest rather than the public interest. What is clear is that an announcement would have benefited the FCA who, in its own words "*had faced significant public scrutiny, including from parliament*"[42] and felt under pressure to show it was taking action, alongside other regulators, including the FRC.

15 We once again see the FCA conflating information being in the public domain with an announcement being in the public interest: "*The Financial Reporting Council (FRC), in line with its routine approach, had previously announced it had opened an investigation into audits of LCF by PwC and two other named firms.*"[43] The fact that the subject-matter concerning LCF, and that the FRC was investigating PwC, were both in the public domain does not mean that a proactive announcement by the FCA would have been in the public interest. If the FCA had communicated its concerns and issued further guidance regarding the relevant reporting obligation of auditors in a disclosure that was not specifically linked to LCF, this would have avoided any concern of unfair prejudice to EY or Oliver Clive & Co and provided much needed clarification to auditors.

Case Study 4 – CB Payments Limited ("CBPL")

16 The PIF factors listed by the FCA include:

PIF factors in favour of announcement	**PIF factors against announcement**
"*This was our first case under Electronic Money Regulations 2011 and our first action against a firm enabling crypto asset trading.*"	"*This may have included considering the risk that the firm's financial promotions provider would withdraw and the impact this could have on the firm and consumer.*"
"*The issues in this case reflect a pattern of concerns which we highlighted in our March 2023 letter to firms' CEOs. Announcing our investigation would have helped demonstrate our focus in this developing area, helping to deter wider misconduct and to protect the integrity of the UK financial system.*"	
"*Around the time we opened our investigation, the Coinbase Group was already subject to public scrutiny from other regulators, including the NYDFS, US SEC and German BaFIN. Against this backdrop, an announcement of our own investigation may have given market users reassurance that we were closely engaged and taking appropriate action. This may have helped to foster public trust and confidence in the market more generally.*"	
"*…disclosures made by CBPL's parent, Coinbase Global, Inc in the US. For example, in its 2022 Annual Report (before we opened our investigation) it had previously disclosed that it is 'subject to*	

[42] Paragraph 5.24, CP24/2 Part 2
[43] Paragraph 5.22, CP24/2 Part 2

ongoing examinations, oversight and reviews, and currently are, and expect in the future, to be subject to investigations and inquiries by U.S. federal and state regulators and foreign financial service regulators, many of which have broad discretion to audit and examine our business."	

17 Many of the points referred to by the FCA do not easily align with the factors the FCA has set out in its table of PIF factors. For example, the FCA has referred to the fact that CBPL was the FCA's first case under the Electronic Money Regulations 2011 and its first action against a firm enabling crypto asset trading.[44] To the extent that these points are connected to a desire to educate the market and help deter wider misconduct, this would not have been achieved through the high-level specimen statement proposed in CP24/2 Part 2 which simply stated that the investigation concerned: "*suspected breaches of a requirement not to take on high-risk customers intended to address potential weaknesses in the firm's financial crime control framework*"[45]. The FCA's focus on financial crime systems and controls is hardly unknown in the market and has been a key pillar of the FCA's regulatory work for a number of years (as referenced at paragraphs 5.34 and 5.43 of CP24/2 Part 2). It is also important to note that it was not the FCA's first "case" as at the commencement of the investigation the facts and evidence are still unknown and a finding of a breach has not yet been made – so it was just its first "investigation".

18 The FCA has not provided any evidential basis to conclude that such a public announcement would "*foster public trust and confidence in the market generally.*"[46]

19 We again note that the FCA appears to focus on what is already in the public domain, as part of its justification that an announcement would be in the public interest. The FCA references the public disclosures of the group company accounts in 2022 (before the FCA opened its investigation) which had "*previously disclosed*"[47] that the group was "*subject to ongoing examinations, oversight and reviews, and currently are, and expect in the future, to be subject to investigations and inquiries by U.S. federal and state regulators and foreign financial service regulators, many of which have broad discretion to audit and examine our business*"[48]. However, this is a general statement about the various regulatory work which would be undertaken on a regular basis in respect of a company of that type and is not a statement which confirms the existence of a specific regulatory investigation and the scope of such an inquiry. The more relevant disclosures in the accounts, which the FCA does not reference and arguably undermine its assessment, appear later in the document and state:

19.1 "*For example, in January 2023, we settled a New York Department of Financial Services ('NYDFS') compliance investigation for a monetary penalty of $50 million and a separate commitment to make $50 million in compliance program investments by the end of 2024*";[49] and

19.2 "*We are not presently a party to any other legal or regulatory proceedings that in the opinion of our management, if determined adversely to us, would individually or taken together have a material adverse effect on our business, operating results, financial condition or cash flows.*"[50]

20 The FCA argues that an announcement would be in the public interest as it "*was also a case where the firm had been subject to extensive supervisory engagement and we had concerns it*

[44] Paragraph 5.33, CP24/2 Part 2
[45] Paragraph 5.40, CP24/2 Part 2
[46] Paragraph 5.36, CP24/2 Part 2
[47] Paragraph 5.38, CP24/2 Part 2
[48] 0001679788-23-000031, page 34
[49] 0001679788-23-000031, page 185
[50] 0001679788-23-000031, page 95

was not complying with formal requirements already put in place to address the FCA's concerns",[51] however this is simply not relevant to any assessment under the PIF Framework. Instead, an announcement of the FCA investigation would have been highly prejudicial to the firm and it could have highlighted the firm's weaknesses for the benefit of criminals looking to exploit such weaknesses to conduct financial crime. However, we consider that the FCA's objectives could have been achieved by making an anonymised and generic disclosure to highlight the risk for consumers and to stress the importance of this issue for other firms in the same industry.

Other comments

21 The four case studies selected by the FCA have a number of similarities, the most striking of which is the **self-interest** of the FCA in making an announcement. Either because the firm was already subject to "public scrutiny" by other regulators (and the FCA wanted to show it was taking action), where the FCA was subject to extensive scrutiny from parliamentary committees, or where the matter triggered significant press coverage due to an egregious incident (from a fraudulent scheme impacting retail investors to a flash crash in the stock market).

22 The focus of the FCA's policy is **consumer protection** and that: "*If consumers know about an investigation, they will be in a better position to consider their options.*"[52] However, the case studies outlined by the FCA do not demonstrate the options available to the consumer, for example:

22.1 consumers impacted by the fraudulent investment schemes of LCF were not able to "avoid" the harm and an announcement of an investigation into PwC's audit role for LCF and its failure to notify the FCA of its concerns earlier would not have enabled consumers to take any pre-emptive or corrective action to protect themselves; and

22.2 customers of CBPL were unlikely to stop using its services or stop trading cryptocurrency altogether due to a generic announcement by the FCA about CPBL's "*financial crime controls*".[53] The FCA itself recognised that CBPL has a significant market share and is "*the most popular crypto asset exchange by UK retail customer numbers*".[54]

23 The proposed statement by the FCA is in fact "generic"[55] and does not contain sufficient detail to assist a customer to assess the risk to them personally or to suggest what action they might take to address those risks. The only aspect of the statement which is not generic is the name of the firm. The FCA's consumer protection agenda in respect of the risks of cryptocurrency for retail investors is better served by its educational efforts and its interventionist supervision agenda.

[51] Paragraph 5.35, CP24/2 Part 2
[52] Paragraph 1.11, CP24/2 Part 2
[53] Paragraph 5.40, CP24/2 Part 2
[54] Paragraph 5.35, CP24/2 Part 2
[55] Paragraph 5.35, CP24/2 Part 2

SECTION E – THE POSITION OF INDIVIDUALS

1 In the First Response, FSLA raised a number of concerns in respect of the potential implications for individuals of the Publication Policy. FSLAFSLA's concerns – drawn from a membership with extensive experience of representing individuals who are subject to FCA enforcement investigations – have not been addressed by the FCA in CP24/2 Part 2.

2 Simply stating that: "*As we said in February, given the specific legal considerations regarding information about individuals, we are not proposing to change our existing approach. That means we will* ***not generally*** *announce when we have opened an investigation into a named individual*"[56] (emphasis added) is not enough to address our specific concerns of direct and indirect identification. As matters stand, the position regarding individuals remains unsettled and FSLA remains concerned about the potential impact on individuals.

3 Central to FSLA's concerns was the question of how the FCA would interpret its Amended Enforcement Guide provisions as they relate to individuals. The relevant paragraph from the Amended Enforcement Guide[57] appended to CP24/2 reads as follows:

"*4.1.5 (1) The FCA* will ***not usually*** *announce that it is investigating a named individual,* ***having regard to restrictions imposed by data protection legislation and other applicable statutory restrictions****. (2) However, the FCA* ***may publish such an announcement****, and updates on such an investigation,* ***if it considers that it is in the public interest to do so****, having regard to the above factors and guidance, and if such an announcement or update can be published without breach of that legislation and those restrictions*"[58] (emphasis added).

4 As CP24/2 Part 2 does not address the above, we assume that it remains the FCA's intention to incorporate these amendments into any revised Enforcement Guide. In those circumstances, it is unfortunate that the FCA is yet to provide any guidance on how this section will be applied in practice, despite calls in the First Response for the FCA to do so.

5 It is imperative, before these amendments to the Enforcement Guide are actioned, that detailed guidance is provided by the FCA so that individuals and other interested parties have the legal certainty they need on the risk that they face. Fairness would dictate that this is the correct course of action. It is not enough for the FCA to rely on its supposed assurances that it will "*not usually*" or "*not generally*"[59] announce that it is investigating a named individual. It is clear that the door very much remains open for the FCA to do so and, without any additional clarity, the FCA's assurances provide little comfort to individuals.

6 The FCA also needs to be clear and unequivocal with its stakeholders, including the FSRC, that the **Publication Policy can be applied to individuals** in the event that it is in the public interest to do so (as per the PIF) and it does not breach other relevant legislation. This is not the same thing as saying the Publication Policy will not apply to individuals and it is obvious that other stakeholders are operating under that misunderstanding:

"***We recognise that the proposals do not extend to naming individuals*** *under investigation publicly. We believe, however, that there is a serious risk inherent in the FCA's proposals that senior managers and other key individuals involved in a firm under investigation can be readily*

[56] Paragraph 1.14, CP24/2 Part 2
[57] FSLA notes that the FCA, in CP24/2 Part 2, has not addressed FSLA's concern that no detailed markup of the proposed amendments to the Enforcement Guide has been provided, leaving stakeholders to reconstruct the changes themselves. Given the significance of some of the changes, this remains disappointing.
[58] Page 47, CP24/2
[59] Paragraph 1.14, CP24/2 Part 2

identified through the FCA's register (or otherwise). This potentially exposes those individuals to reputational damage regardless of the outcome of the investigation"[60] (emphasis added).

7 It is incumbent on the FCA to be far clearer on the scope and impact of the Publication Policy as part of the consultation process.

Direct and indirect identification

8 As matters stand, the direct identification, or more likely the indirect identification, of individuals has a very real risk of crystallising for the reasons set out in the First Response.

Data protection

9 Turning first to direct identification, the FCA continues to face challenges navigating UK GDPR protections, which generally prohibit processing personal data without a lawful basis and so long as it is in the public interest to do so. For regulators such as the FCA, processing must typically be necessary for performing tasks in the public interest or in the exercise of official authority. However, as set out in the First Response,[61] the effectiveness of those protections will ultimately depend on the internal processes deployed by the FCA to ensure that its decision-making is objective. In CP24/2 Part 2, the FCA has provided no details on the steps it will take to ensure a robust data protection assessment.

Human rights

10 Despite the concerns raised in the First Response[62] on the need to address the Human Rights Act implications of the Publication Policy, CP24/2 continues to be effectively silent on this critical issue, with the exception of one small mention: "*We will only take decisions on whether to announce after we have considered the firm's representations along with any legal issues, for example to ensure any announcement complies with relevant personal data and human rights legislation.*"[63]

11 We remain of the view that the Publication Policy may be subject to potential challenges for breaches of Human Rights principles (as enumerated under the ECHR and implemented by way of the Human Rights Act 1998) and, in particular, breaches of Article 6 (Right to Fair Trial) and/or Article 8 (Right to respect for private and family life). FSLA notes that the FCA's immunity would not apply in respect of individual claims for breaches of human rights (Section 222 FSMA). It is imperative that the FCA actively engages with this significant legal issue.

Statutory Notice Framework

12 The FCA has not addressed the concerns raised in the First Response[64] as to how it plans to reconcile the differences between the Publication Policy and the protections for individuals set out in the Statutory Notice Framework, implemented by FSMA. We reiterate the point that the FCA should consider whether publicly naming an individual would be unfair to the individual, in line with the considerations set out in the Statutory Notice Framework.

Indirect identification

13 Indirect identification, which FSLA considers may in practice be a more likely occurrence than direct identification, continues to pose a serious risk to individuals. Indirect identification will generally occur when the FCA names a firm under investigation, leading to inferences about individuals within the firm. This is particularly concerning in small firms with few senior managers or when specific business areas are identified as being under investigation. It is

[60] Paragraph 66, FSRC Report dated 6 February 2025
[61] Section F, paragraphs 4-4.2
[62] Section C, paragraph 35 of the First Response
[63] Paragraph 4.17, CP24/2 Part 2
[64] Section F, paragraph 7

widely known in the industry that firms and individuals are often investigated concurrently, which generally prompts market speculation about who may be under investigation.

14 The FSRC Report echoes FSLA's concerns in this regard, noting that "*the second consultation does not, however, contain any proposed measures to address the concern that senior managers connected to firms where investigations are announced could be identified.*"[65] The FSRC Report further stated: "*… there is a serious risk inherent in the FCA's proposals that senior managers and other key individuals involved in a firm under investigation can be readily identified through the FCA's register (or otherwise). This potentially exposes those individuals to reputational damage regardless of the outcome of the investigation.*"[66]

15 This risk is clearly highlighted in all of the Case Studies outlined by the FCA. For example, in respect of **Case Study 1 (BSPS)** (see Section D, paragraph 7 above) the FCA itself recognises that "*some of the firms involved were relatively small and they, and their staff, could be significantly affected by announcing and naming them*".[67] The names and details of connected individuals and employees would be easy to access via the FCA Register or Companies House, yet the Publication Policy does not provide any meaningful guidance as to how the FCA would approach this assessment. The FCA simply states: "*The firms would have been able to make representations to us about this, which we would have carefully considered before making a decision*". However, this assumes that the subject firm's interests and those of any individuals who could be indirectly identified are aligned, but that is often not the case, especially if there has been an internal investigation, disciplinary process or individuals have moved onto other firms (and thereby risking that some of the reputational risk could be transferred to another firm by mere association).

Impact on individuals

16 As mentioned in the First Response,[68] it is essential to consider the impact on these individuals. Being linked to a firm under investigation can inevitably cause reputational damage, regardless of personal involvement. This association can have a devastating effect on their livelihood and, as is often the case, their physical and mental health.

Practical considerations for individuals

17 In terms of practical considerations in the context of indirect identification, it remains unclear how individuals will be informed if they are indeed at risk of being indirectly identified:

17.1 Will there be a mechanism by which firms and/or the FCA will notify individuals in these circumstances? If so, when in the process will such notification occur and with what information will they be provided?

17.2 Will that notification be made before or after the indirect identification has taken place?

17.3 If individuals are made aware of their indirect identification before it occurs, will they be permitted to make representations in respect of how identification of the firm will prejudice them? What factors will the FCA take into account when considering those representations?

18 The FCA must provide clear guidance on these points and ensure that these points are covered in any amended Enforcement Guide which must then be subject to full consultation. We urge the FCA to engage with FSLA's calls for additional guidance as well as the detailed concerns outlined in Section F of our First Response or, at the very least, to directly address why they disagree with the points raised.

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[65] https://publications.parliament.uk/pa/ld5901/ldselect/ldfsrc/76/76.pdf (paragraph 65)
[66] https://publications.parliament.uk/pa/ld5901/ldselect/ldfsrc/76/76.pdf (paragraph 66)
[67] Paragraph 5.10, CP24/2 Part 2
[68] Section F, paragraphs 15-16

SECTION F – NEXT STEPS

1 The primary position of FSLA remains as detailed at paragraph 2 in Section H of the First Response – that we do not support the introduction of the Publication Policy (in any form, even in its amended form). We consider that the FCA's aims and objectives can be achieved through alternative means which would not **unfairly prejudice** the rights of regulated firms and individuals caught in the cross-hairs of an Enforcement investigation, would not ride roughshod over the statutory protections in place and the **clear intention of the legislature** when enacting the FSMA, and has the potential to be **fundamentally inconsistent** with the FCA's secondary international competitiveness and growth objective.

Alternative approaches

2 Whilst the FCA has indicated that it will consider the benefits of an anonymous "Enforcement Watch"[69] and has introduced a number of additional factors into the PIF (see Section C, paragraphs 10 - 20 above), it has not meaningfully engaged with a number of other alternatives available to it, including:

2.1 adopting a Proportionality Framework: This would require the FCA to undertake a "balancing test" between factors in favour of publicity (with the public interest, consumer protection and improving the speed and efficiency of the investigations as factors) against those which weigh against publicity (such as potential harm to the subject and the risk of causing consumer and market panic);

2.2 refreshing its approach to the existing "exceptional circumstances" test in the Enforcement Guide: The FCA has adopted an unnecessarily restrictive interpretation of what constitutes "exceptional circumstances" that the case must be "exceptional" in the context of the Enforcement portfolio at that specific time. This is an overly restrictive and potentially illogical approach which could lead to inconsistent outcomes. This is demonstrated by the FCA's assessment in respect of BSPS (**Case Study 1**) which noted: "*We did not announce these investigations under our present policy as investigations into poor investment advice aren't exceptional. So, while the scale of the BSPS scandal was exceptional, each firm investigation was not*."[70] We must support the logic of the FSRC who continues to query: "*In the context of its existing powers, the FCA's explanation for how these proposals will further its objectives is unconvincing. It remains unclear why a broader interpretation of 'exceptional circumstances' could not be considered in place of the proposed public interest test, particularly where there is an immediate risk to consumers*;[71]

2.3 reverting to "exceptional circumstances" for individuals: Whether the FCA adopts the PIF or the Proportionality Framework as proposed above, the FCA must revert to ensuring that the direct or indirect identification of individual investigation subjects (or those who are not subject to investigation but may be identified) may only incur in exceptional circumstances (see Section E above).

Next steps for the consultation process

3 FSLA also considers that it remains incumbent on the FCA to take further steps to consult and refine the Publication Policy before proceeding to implement such a fundamental policy change. FSLA considers that further consultation is essential, especially in light of the significant

[69] Paragraph 5.42, CP24/2 Part 2
[70] Paragraph 5.7, CP24/2 Part 2
[71] Paragraph 5, Summary of Conclusions, FSRC Report dated 6 February 2025

concerns raised in the FSRC Report. In terms of the **content of any further consultation**, FSLA would hope to see the FCA:

3.1 substantively address the **various legal issues and concerns** raised in the First Response (see Section C);

3.2 provide more **practical detail** and **specific criteria** on how the Publication Policy will operate in practice, as called for by the FSRC: "*The FCA must be able to demonstrate that its proposed new regime is underpinned by robust, fair and proportionate processes for the assessment of 'public interest'. Further guidance on how the factors contained in the public interest framework will work in practice should be published, before any final decisions are taken*";[72]

3.3 provide evidence to support its conclusions rather than bare assertion and, at a minimum, should include a **cost benefit analysis**. FSLA supports the FSRC's conclusion that: "*Given that the enforcement investigation proposals represent a significant departure from the FCA's previous approach, it remains our firm view that proposed changes of this extent necessitate a robust and detailed analysis of the direct costs to the sector. Wider factors in the UK's growth and competitiveness should form part of this analysis. The need for such an assessment will be underscored if, as happened following the publication of the first consultation, the feedback the FCA receives on its second consultation reiterates the call for a cost benefit analysis – the FCA must be transparent about the views expressed on this issue*";[73] and

3.4 include, with any further consultation publication, a detailed **comparative document** showing the precise changes as between the Current and Amended Enforcement Guide. FSLA does not consider that the FCA has addressed the material concerns raised about other material changes proposed to the Enforcement Guide (which are currently flying under the radar due to the headline issues around "naming and shaming"). This includes a number of key changes:

(a) amendments to the approach to legal privilege and waivers which could erode these fundamental legal protections;[74]

(b) that Scoping Meetings no longer be the normal first stage of the investigation process[75] (a development which FSLA does not support, as a high-quality meeting can be useful to deliver a focused and timely investigation); and

(c) erosion of a person's right to be accompanied by a legal adviser when attending an investigation interview.[76]

4 Commensurate with FSLA's objective to foster cooperation with the FCA, representatives of FSLA would welcome an opportunity to meet with the FCA to discuss the Publication Policy and the points raised in this response. We confirm that FSLA is content for its response to be publicly referenced by the FCA.

5 If you have any questions in respect of this response, please contact FSLA at our dedicated email address: fcacpfsla@gmail.com.

[72] Paragraph 73, FSRC Report dated 6 February 2025
[73] Paragraph 107, FSRC Report dated 6 February 2025
[74] Section G, paragraph 13 of the First Response
[75] Section G, paragraph 16 of the First Response
[76] Section G, paragraph 19 of the First Response

Annex A

Firm / Chambers / Organisation
Mishcon de Reya
3VB
Enterprise Chambers
3 Hare Court
Eversheds Sutherland
Corker Binning
39 Essex Court
Herbet Smith Freehills
Cornerstone Research
Withers
Peters & Peters
Blackstone Chambers
Outer Temple Chambers
Burges Salmon
Punter Southall Law
Squire Patton Boggs
Ashurst
Latham Watkins
XXIV Old Buildings
DWF
Travers Smith
Walker Morris
Constantine Law
Pallas Partners
Dentons
Lewis Silkin
Gough Square

Annex B – FCA CP24/2 Part 2 Online Questionnaire

"CP24/2, Part 2: Greater transparency of our enforcement investigations"	
A. Assessing what is in the public interest	
Question 1	Staged decision-making process (see paras 4.1 – 4.10) ***If we were to take our proposals forward, we anticipate taking a decision in stages, focusing on what is reasonable and proportionate at each step.***
	Do you have any comments on the proposed staged decision-making process to announce investigations? We do not have any specific comments on the staged decision-making process.
Question 2	The revised public interest assessment (see paras 4.1 – 4.10) ***We have identified potentially relevant factors to consider when deciding if an announcement could be in the public interest.***
	Do you have any comments on the factors we have identified, or further factors we should consider? We have significant concerns about the PI Framework. See Section C (paragraphs 10 - 20).
Question 3	Applying our proposals to our existing investigations (see para 4.12) ***We are amending our proposals to make clear that we would only announce or update on existing investigations where the announcement would be reactive.***
	Do you have any comments on this suggested change? We have significant concerns about the application of the PI Framework to existing investigations. See Section C (paragraph 2).
Question 4	Giving firms time to respond (see paras 4.14 – 4.16) ***We would generally share a copy of the proposed announcement and provide firms with at least 10 business days to make any representations to us. This may also give firms time to consider whether they want, or may be required, to make an announcement themselves. If, after considering the firm's representations, we still decide to publish an announcement, we would share our reasons and give firms a copy of the final text at least 2 business days before we publish it.***
	Do you have any comments on these proposals? We have significant concerns about the timetable detailed in the Publication Policy. See Section C (paragraphs 3 - 6).
Question 5	Safeguards (see para 4.17 – 4.19)

	We have provided detail on our process when deciding whether to announce.
	Do you have any comments on these proposals? We have significant concerns about the safeguards detailed in the Publication Policy. See Section C (paragraphs 7 - 9).
B. Case Studies	
We welcome feedback on these case studies, including on whether the public interest would be served in naming these firms while under investigation when we have indicated we might do so.	
Case Study 1	British Steel Penson Scheme (see para 5.4 – 5.12)
	Do you have any comments on this case study? See Section D of the FSLA response.
Case Study 2	Citigroup Global Markets Limited (see para 5.13 – 5.20)
	Do you have any comments on this case study? See Section D of the FSLA response.
Case Study 3	PricewaterhouseCoopers LLP (see para 5.21 – 5.28)
	Do you have any comments on this case study? See Section D of the FSLA response**.**
Case Study 4	CB Payments Limited (see para 5.29 – 5.40)
	Do you have any comments on this case study? See Section D of the FSLA response.
C. Where we might announce but not name the firm (see paras 5.41 – 5.48)	
Do you have any comments on the examples provided of when we might announce but not name the firm? We support the use of anonymised announcements which can deliver increased transparency and educational benefit to the market, investors, consumers and practitioners. We consider that this is possible to achieve without amending the current Enforcement Guide and without the introduction of the Publication Policy.	
D. Impact of proposals on firms (see paras 6.1 – 6.15)	
We propose including impact as a factor in our public interest framework with a 10-day window for representations.	
Do you have any comments, data or evidence on the potential impact of our proposals on firms? We have significant concerns about the PI Framework. See Section C (paragraphs 10 - 20).	

E. Competitiveness (see para 6.16 – 6.29)
We will continue to consider carefully evidence on growth and competitiveness as we decide on our approach and welcome further feedback.
Do you have any comments, data or evidence on the potential impact of our proposals on growth and competitiveness? We do not consider that the FCA has adequately addressed this issue. See Section B (paragraphs 8 – 9).
F. Other comments
Do you have any other comments in response to our paper?
Please refer to our full written response dated 17 February 2025.