
Concerns remain over FCA's 'name and shame' proposals

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An enforcement investigation by the Financial Conduct Authority (**FCA**) can be an extremely expensive and stressful experience for regulated firms and individuals alike. In February this year, the FCA launched a controversial consultation on proposals which would only have exacerbated the experience and likely caused reputational, as well as financial, damage. The key elements of those proposals were:

1. publicly announcing enforcement investigations into FCA-regulated firms early in the investigative process subject to a “*flexible public interest framework*”. Many practitioners understood this to mean that publication would occur in the majority of cases;
2. giving the investigation subject no more than one business day's notice of an announcement; and
3. publishing updates on an investigation, including closure.

The proposals caused uproar across the financial services industry and even across political party lines. The House of Lords Financial Services Regulation Committee warned in April that the proposals risked having a disproportionate impact on investigation subjects, with the Chair stating,

“‘Innocent until proven guilty’ is a fundamental principle of our justice system. The committee is presently unconvinced that the FCA has justified departing from this important principle and taking an approach that is at odds with almost all other financial services regulators.”

The FCA's Response

Last week, after months of considering the finer details of the backlash, the FCA published the 'second phase' of its consultation. Although it involves some significant changes and clarifications to the proposals, concerns around the departure from the fundamental maxim, 'innocent until proven guilty', remain.

No discernible change has been made to the stage at which the FCA proposes to announce investigations – early in its investigative process when, supposedly, no judgments have been made. However, firms would be given 10 days' notice ahead of any announcement, as opposed to the one

business day originally proposed. This will enable firms to make representations, which many called for. The FCA is also proposing to allow firms an additional 48 hours' notice before publication should the Authority decide to announce. This will provide firms with further opportunity to formulate their communications strategy as best they can to mitigate the negative impact.

The FCA has clarified that if the proposals come into force, there would only be additional announcements of investigations "*in a very small number of cases*" and investigations that commenced before any changes to the policy come into effect will not be announced under the new policy (unless they are already in the public domain); those who have already received notice of investigations can, therefore, breathe a sigh of relief in that respect.

The public interest test for assessing whether investigations should be announced will also now include two significant factors which were noticeably absent from the original proposals: the potential negative impact on a firm of the announcement; and the potential for an announcement to seriously disrupt public confidence in the financial system or the market.

The FCA had previously explicitly excluded the first, stating that the public interest assessment should focus primarily on promoting the regulator's statutory objectives and providing reassurance that it was acting in the interest of consumers and investors. Naturally, this provoked widespread cynicism that the FCA was motivated above all by the desire for good publicity to counteract the criticism it has faced in recent years over inaction.

A Step in the Right Direction

The updated proposals address many of the concerns raised in response to the original consultation. They have brought a semblance of balance to the potential new policy, allowing subject firms much more opportunity to be heard and the negative ramifications of an announcement explicitly considered.

However, the fundamentals remain: announcements of investigations into firms near the outset, when no wrongdoing has been proven. Whilst the proposals do not extend to individuals under investigation, the senior managers connected to a particular business are identifiable on the financial services register. The reputational impact on them – for the duration of the investigation and thereafter – irrespective of the outcome, will likely be significant, but consideration of that has been omitted from the proposals.

Feedback on the consultation is due by 17 February 2025 with the FCA Board aiming to make a final decision on the policy in Q1 2025. Commentators will hope that, in the wake of last week's damning All-Party Parliamentary Group report, the FCA will listen to any further feedback and amend its proposals accordingly.

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