



By email to: cp24-2@fca.org.uk

Enforcement Law and Policy
Financial Conduct Authority
12 Endeavour Square
London E20 1JN

22 April 2024

AFM Response to FCA CP24/2, FCA Enforcement Guide, and publicising enforcement investigations

1. I am writing in response to this consultation paper, on behalf of the Association of Financial Mutuals. The objectives we seek from our response are to:
 - Register our misgivings about the proposals, and
 - Explore the implications for our members.

About AFM and its members

2. The Association of Financial Mutuals (AFM) represents insurance and healthcare providers that are owned by their customers, or which are established to serve a defined community (on a not-for-profit basis). As a whole, mutual insurers manage the savings, pensions, protection and healthcare needs of over 26 million people in the UK and Ireland, collect annual premium income of over £23 billion, and employ nearly 23,000 staff¹.
3. The nature of their ownership and the consequently lower prices, higher returns or better service that typically results, make mutuals accessible and attractive to consumers, and have been recognised by Parliament as worthy of continued support and promotion. In particular, FCA and PRA are required to analyse whether new rules impose any significantly different consequences for mutual businesses² and to take account of corporate diversity³.

¹ ICMIF and AFM, 2023: <https://financialmutuals.org/wp-content/uploads/2023/10/UK-Market-Insights-2023.pdf>

² Financial Services Act 2012, section 138 K: <http://www.legislation.gov.uk/ukpga/2012/21/section/24/enacted>

³ <http://www.legislation.gov.uk/ukpga/2016/14/section/20/enacted>

Introductory comments

4. We welcome the opportunity to respond to this consultation paper. The majority of our comments relate to the proposals in Chapter 3, on publication of enforcement investigations.
5. The role of enforcement is vital to FCA in delivering its primary objectives, and it is also essential in ensuring firms properly recognise the importance of good behaviours. During the time of the Financial Services Authority, and in the early years of the FCA, enforcement action appeared to largely focus on administering financial penalties, and with an expectation that the threat of censures and fines would encourage good compliance. That often meant a pursuit of actions that might generate the most media coverage; hence the '20 biggest FCA fines of all time' were all levied on banks⁴.
6. However, in recent years the value of fines appears to be reducing and the number of successful actions has fallen, whilst the average time taken to resolve enforcement cases has risen to more than three years (with a marked rise to 40 months in 2022/23, compared to 25 months in 2020/21⁵). This coincides with the very low levels of successful action taken against SMFs under the SMCR.
7. All this reinforces the need for a more effective approach to ensuring FCA enforcement activity is seen to be productive, and that this work encourages firms to adopt high standards of compliance. For some FCA stakeholders, current trends in enforcement action mean there is an argument to finding more effective ways of drawing attention to issues that have a wider impact- as well as a potentially material impact on consumers.

Consultation process

8. We are concerned about the nature and tone of this consultation paper. As there are no new rules and no CBA, we question whether the document is more akin to a regulatory discussion paper. The document marks a significant change in tone, to regulation by decree rather than consensus. In addition, the proposals are set out as if they are at an early stage of development; examples provided are sparse and rudimentary; changes to the EG sourcebook are presented without tracked changes, making it difficult to comment on changes; and no attention has been given to considering the impact of publicising enforcement investigations. The short deadline for responses initially

⁴ <https://www.skillcast.com/blog/20-biggest-fca-fines>

⁵ [FCA publishes enforcement trends data: Key Takeaways \(ashurst.com\)](#)

posed, particularly over the Easter break, was not conducive to enabling constructive responses, though we are grateful for the extended deadline since provided.

9. In the consultation paper, FCA suggests there is a strong relationship between the number of whistleblower reports received, and publicity of FCA enforcement action, with an expectation that publishing information about investigations will generate more whistleblowing. However the consultation paper has not presented any evidence to support this: data on the FCA website indicates FCA receives around 1,000 whistleblower reports each year, and that typically around 5% of these lead to investigations⁶. The evidence does not therefore appear to support the FCA case, and for a potential whistleblower to be convinced of the merits of reporting their concerns, greater attention may need to be given to showing that whistleblowers will be carefully listened to, and that whistleblowing results in effective FCA action. Equally, within AFM we recently polled members on the number of whistleblower reports received: none of the members in our sample reported any whistleblower cases at all, and whilst that might be a cause for reassurance, a number of organisations were exploring whether they should devote more resources and training to the topic, including what triggers whistleblowing, why some people are minded to whistleblow and others not, and whether the firm presents any barriers to an individual with grounds for concern, and how to ensure staff are more aware of the potential to raise issues. Further elaboration on its thinking by FCA, and on the link between whistleblowing and enforcement, would be helpful.

Publicising enforcement investigations (Question 1)

10. Considering more directly the proposal to publish information on enforcement investigations, we are concerned that the FCA plans to take carte blanche in determining whether and how to publish information. Rather than the case-by-case basis assumed in the consultation, we would like to see FCA develop some clear guidelines on the tests every enforcement investigation needs to have passed before considering whether it is published. For example, the consultation paper points to other regulators that already publish information about enforcement actions. However, only one of the examples cited is a retail financial services regulator, and in that case, the Monetary Authority of Singapore has only published details of two enforcement investigations in the last seven years, and those coincided

⁶ <https://www.fca.org.uk/freedom-information/information-whistleblowing-reports-2019-2021-may-2022>

with police investigations into suspected serious misconduct and fraud⁷. In these cases, early alerts about the nature of the investigation, in conjunction with other authorities, may be warranted in order to address foreseeable harm for consumers and because they signal potential criminal activities. The same might be said of active court action against a firm, where the absence of regulatory comments would might pose a threat to consumers. Outside these obvious cases where early announcements would be important to safeguarding consumers, we do not consider there to be a case for publication.

11. Publishing investigations at a relatively early stage means firms will potentially be treated as being guilty until they can prove their innocence. So whilst it is reassuring to hear that FCA aims to publicise investigations that it has closed- as well as those it has opened- it is inevitable that the media will be much more interested in sensationalising potential failures, rather than firms that are given a clean bill of health. As the statistics prove, in most cases no action is taken.
12. And in the process of publication, there is a risk this exacerbates issues or problems within a firm, and that this could cause a firm to fail rapidly and in an uncontrolled manner, increasing the likelihood of poor consumer outcomes. Similarly, there is a significant risk for the FCA that it will face costly and lengthy litigation as a result of these disclosures which will divert attention and resource away from the actual investigation, as well as increasing FCA operating costs.
13. There is also a risk that an investigation relates to market sensitive information, or might trigger a negative reaction in markets: as set out in paragraph 2.15, there are a set of legal obligations imposed on FCA, and there is a risk that early publication of investigations might contradict the controls imposed by s348 and s205 of FSMA. FCA will be familiar with the consequences of its announcement in 2014 that it planned to free 'savers locked into rip-off pensions and investment'⁸, which led to significant market turmoil for a number of large insurers. The ensuing Davis report set out a range of important lessons for FCA in the way that it briefs the press and on senior accountability, and we would expect FCA to apply these standards in any plans to publish enforcement investigations⁹.
14. In any event, an announcement by FCA that it is investigating alleged failings in a firm will lead to reputational risk- regardless of whether the

⁷ <https://www.mas.gov.sg/regulation/enforcement/enforcement-actions?page=1&q=&sort=&rows=10#MasXbeEnforcementActionKeyword>

⁸ <https://www.telegraph.co.uk/finance/personalfinance/pensions/10728440/Savers-locked-into-rip-off-pensions-and-investments-may-be-free-to-exit-regulators-will-say.html>

⁹ <https://www.fca.org.uk/publication/corporate/davis-inquiry-report.pdf>

concerns are proven or not. This would be avoided if FCA committed to making anonymous announcements, until there was a proven issue and a legally verified need to act with a particular firm. This would avoid the risk that publication might hamper the investigation: for example if the firm is reluctant to cooperate as a result of negative publicity or the fear that information might be placed into the public domain, or if there are criminal accusations that might be undermined by a premature press release.

15. A particular concern for mutual organisations is that they lack the marketing budgets to refute announcements, or to bounce back from failed investigations. The omission in the consultation of a section on the 'impact on mutuals' suggests FCA has not considered the consequences for different audiences of its planned announcements.

The public interest framework and making announcements (Question 2-6)

16. The factors set out in paragraph 3.5 are similar to the actions FCA will set out for firms at an early stage of investigation. In a case of mis-selling, we have seen actions that include closing to new business, contacting all affected customers, internal communications within the firm and setting out plans for remedial training and establish more effective procedures. The framework therefore builds on the approach already established, and which FCA is free to publicise, albeit (usually) at a stage when a s166 independent skilled persons report has been undertaken. We note an apparent increase in the number of reports commissioned in 2023/24¹⁰.
17. At this stage we do not agree with the proposed approach to announcements (Questions 3 to 6), and would welcome more information from FCA in the first instance to establish the case for publicity.

The revised Enforcement Guide (Questions 7 to 16)

18. A full draft of the revised Guide is set out as an Appendix to the Consultation; however, as there are no tracked changes it is not possible to provide an informed view of the changes made without an extensive legal review, for which we do not have resources. We are not therefore making comments on this section of the consultation.

¹⁰ <https://www.fca.org.uk/about/how-we-regulate/supervision/skilled-persons-reviews>

19. We would welcome the opportunity to discuss further the issues raised by our response. We are happy to be included in the published list of respondents.

Yours sincerely,



Martin Shaw
Head of Policy
Association of Financial Mutuals