

April 30, 2024

Via Electronic Filing

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

Re: CP24/2: Enforcement Guide and Publicising Enforcement Investigations

Dear Sir or Madam:

The Investment Adviser Association (IAA)¹ appreciates this opportunity to comment on the Financial Conduct Authority's (FCA's) consultation relating to publicizing enforcement actions.² We recognize the importance of regulatory transparency and understand the rationale behind potentially publicizing investigations. However, the FCA's proposed policy to publish the names of firms under investigation before any findings have been made will be highly prejudicial to firms and confusing to clients and will not serve the public interest. The IAA therefore strongly opposes the proposal. Instead, we urge the FCA to maintain its current practice of confidentiality of investigations until a formal administrative or legal action is taken.³

There are significant drawbacks from the FCA's publicly announcing the opening of enforcement investigations before any formal administrative or legal action is taken and/or penalty is imposed. The IAA is concerned that the mere fact of a public announcement that an identified firm is under investigation may lead investors to infer that wrongdoing has occurred, or that there is a real prospect of wrongdoing having occurred, and cause investor concern, if not alarm. Investor concern and confusion will be exacerbated by the fact that the public announcements will not clearly differentiate between the potential severity of different investigations or provide other context, which could unfairly damage clients' relationships with

¹ The IAA is the leading organization dedicated to advancing the interests of fiduciary investment advisers. For more than 85 years, the IAA has been advocating for advisers before Congress and U.S. and global regulators, promoting best practices and providing education and resources to empower advisers to effectively serve their clients, the capital markets, and the U.S. economy. The IAA's member firms manage more than \$35 trillion in assets for a wide variety of individual and institutional clients, including pension plans, trusts, mutual funds, private funds, endowments, foundations, and corporations. For more information, please visit www.investmentadviser.org.

² FCA, *Consultation Paper, Our Enforcement Guide and publicising enforcement investigations—a new approach*, CP24/2 (Feb. 2024), available at <https://www.fca.org.uk/publication/consultation/cp24-2.pdf> (Consultation).

³ As discussed below, this is consistent with the approach of the U.S. Securities and Exchange Commission (U.S. SEC).

their asset managers and discourage investors from investing or continuing to invest with any of the firms that are the subject of an announcement.⁴

The proposal also does not take into consideration the impact of a public announcement on the targeted firm or its employees.⁵ Public announcements can needlessly damage firms' or their employees' reputations, especially in the many cases where the investigation ultimately finds no wrongdoing. And this damage will likely last well beyond the end of an investigation.⁶ Despite the fact that the public notice would state that "the opening of an investigation should not be taken to imply that we have reached any conclusion that there has been a breach or other misconduct or failing nor determined what resulting enforcement action, if any, is appropriate,"⁷ it likely will be taken that way. Otherwise, it is hard to see what purpose such a notice would serve. As noted previously, firms under investigation have not been proven to have done anything wrong. In fact, according to a recent public statement by the FCA's Joint Executive Director of Enforcement and Market Oversight, approximately *two-thirds of investigations opened by the FCA lead to no further regulatory action being taken*.⁸ The IAA is concerned that the proposed process also does not include any practical means for a firm to fairly respond to an announcement by the FCA, such as rebutting the investigation or putting it into context.

More fundamentally, it is unclear why the FCA considers that it needs to name firms under investigation to achieve its stated aims.⁹ The IAA firmly believes that the FCA's enhanced transparency and investor protection goals could largely be achieved without publicly naming a firm or an individual at the investigation stage. For instance, the FCA could provide more timely and detailed reporting of the pace and efficiency of investigations as well as subject matters under investigation and enforcement trends (similar to its Market Watch publication). We believe this is an adequate alternative that can provide critical information to investors to empower them to ask the right questions when investing with a firm. Moreover, when a breach

⁴ While the announcement would include a summary of the suspected breach, failing or other misconduct being investigated, the IAA believes this would not sufficiently narrow the broad spectrum of conduct being investigated.

⁵ This is a significant departure from the FCA's current practice where the FCA "will consider the potential prejudice that it believes may be caused to any persons who are, or who are likely to be, a subject of the investigation." FCA, *Handbook*, EG 6.1.3, available at <https://www.handbook.fca.org.uk/handbook/EG/6/1.html>.

⁶ When the FCA launches an investigation into a company, that information becomes easily accessible through media reports, FCA press releases, and simple online searches. This can have a lasting negative impact on the company's reputation, especially for smaller firms. Since smaller firms typically generate fewer search results overall, any mention of the investigation will be more prominent and potentially damaging, regardless of how much time has passed since the investigation began.

⁷ Consultation, *supra* note 2, at 3.9.

⁸ Kirstin Ridley, *UK's FCA plans to announce corporate probes early in deterrent push*, Reuters (Feb. 27, 2024), available at <https://www.reuters.com/world/uk/uks-fca-plans-lift-veil-investigations-early-discourage-misconduct-2024-02-27/> (emphasis added).

⁹ The FCA has several methods that would allow it to move immediately to stop ongoing misconduct including Prohibition Orders and Injunctions. See FCA Handbook, *supra* note 5.

of rules or regulations is found to have occurred, the FCA could publish a detailed account of the alleged underlying facts and circumstances to explain the misconduct and resulting harm.

This would align the FCA's process with the established procedures of the U.S. SEC. For example, the U.S. SEC regularly issues reports and its Commissioners and other officials make speeches on these topics, and the agency issues detailed and comprehensive press releases once it has completed its investigation and determined that the facts at issue warrant the filing of charges. Until that determination is made, U.S. SEC investigations are "generally conducted on a confidential basis to maximize their effectiveness and protect the privacy of those involved. Because SEC investigations are generally nonpublic, [the SEC's Enforcement Division] will not confirm or deny the existence of an investigation unless the SEC brings charges against a person or entity involved. [The Division of] Enforcement also will not provide updates on the status of any pending SEC investigation."¹⁰

For the reasons discussed above, we strongly urge the FCA to maintain its current practice of confidentiality during investigations.

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We appreciate your consideration of our comments on this important issue. Please do not hesitate to contact the undersigned at 1 (202) 293-4222 if we can be of further assistance.

Respectfully Submitted,

/s/ Gail C. Bernstein
Gail C. Bernstein
General Counsel

/s/ William A. Nelson
William A. Nelson
Associate General Counsel

¹⁰ U.S. SEC, *Investor Bulletin: SEC Investigations* (Oct. 22, 2014), available at https://www.sec.gov/oiea/investor-alerts-bulletins/ib_investigations. The U.S. SEC's Enforcement Manual also mandates confidentiality during the investigation process: "All information obtained or generated by SEC staff during investigations or examinations should be presumed confidential and nonpublic unless disclosure has been specifically authorized." U.S. SEC, Division of Enforcement, *Enforcement Manual* (Nov. 28, 2017), available at <https://www.sec.gov/divisions/enforce/enforcementmanual.pdf>. In emergency situations, the U.S. SEC can file an emergency action requesting a temporary restraining order and asset freeze to stop an ongoing fraud. *Id.*