30 April 2024

Via email: cp24-2@fca.org.uk

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

Dear Sir/Madam,

Re: Consultation Paper 24/2 – The FCA's Enforcement Guide and Publicising Enforcement Investigations – A New Approach

MFA[1] appreciates the opportunity to represent the views of the global alternative investment industry in this written response to the Financial Conduct Authority's (FCA) Consultation Paper 24/2 on the Enforcement Guide and Publicising Enforcement Investigations (the Consultation Paper or CP24/2).

MFA appreciates the FCA's intention to improve the timeliness and transparency of areas of regulatory investigations. The proposal to publish current trends and topics of investigations and enforcement actions by regulatory authorities is generally well received by MFA members and is generally helpful to asset management firms by highlighting compliance topics and reminding firms of their regulatory obligations.

MFA is firmly of the view that the enhanced transparency and investor protection measures can be achieved without publicly naming a firm or an individual under investigation where the FCA has not drawn any conclusions regarding any breach of rules of regulatory standards. MFA finds the absence of consideration displayed by the proposals of the impact on firms, individuals, and investors of FCA-authorised firms highly irregular.

MFA expresses its deep concern that the proposals in CP24/2 fundamentally undermine the competitiveness of the UK as a financial centre, for investment management firms, individuals, and issuers

[1] Managed Funds Association (MFA), based in Washington, DC, New York, Brussels, and London, represents the global alternative asset management industry. MFA's mission is to advance the ability of alternative asset managers to raise capital, invest, and generate returns for their beneficiaries. MFA advocates on behalf of its membership and convenes stakeholders to address global regulatory, operational, and business issues. MFA has more than 180 member fund managers, including traditional hedge funds, credit funds, and crossover funds, that collectively manage over $3.2 trillion across a diverse group of investment strategies. Member firms help pension plans, university endowments, charitable foundations, and other institutional investors to diversify their investments, manage risk, and generate attractive returns over time.

alike. The proposals cut across the principles of trust and confidence in the prudent, reasonable, and considered regulatory environment that the financial industry has long appreciated. The proposals carry such significant potential consequences to firms that the risk of a firm becoming subject to an investigation that is made public before any investigation – much less conclusions are drawn – will for some firms outweigh the benefits of opening or retaining an office in the UK.

MFA considers there to be no justifiable reason for the FCA to depart from its longstanding practice in the manner proposed. The proposals in CP24/2 should be withdrawn or fundamentally revised such as to ensure that the FCA will not publicly identify a firm under investigation and such details not be publicly released until the completion or settlement of the investigation or matter other than in exceptional circumstances, consistent with current practice in the UK. This approach would be consistent with longstanding protocols implemented in the US by the Securities and Exchange Commission (SEC) and other global regulators. In fact, with one exception (Singapore), MFA is unaware of *any* securities regulatory authority that would take the exceptional view of "naming and shaming" firms and individuals that are under investigation where not even preliminary findings of any wrongdoing have been established. Given that 65% of the investigations by the FCA have historically not resulted in enforcement[2] a premature announcement at a stage when often even the facts have not been agreed seems counterproductive.

MFA disagrees with the FCA's view that no cost benefit analysis is required. MFA understands that the FCA has customarily provided a cost-benefit assessment where the new rules, policies or processes include some novel or uncustomary element. The FCA appears to have falsely assumed that firms would incur no costs resulting from the FCA adopting the new policy it proposes, when in fact the policy would require significant contingency provision by firms to address potentially material increase in operational and business costs, to the detriment of investors as well as firms.

Further, any proposed disclosure of a firm or an individual under investigation would need to be considered with reference to a public interest framework that adequately considers the interests of and the impact on the investigation subjects and those associated with them. The present proposals do not provide an adequate and reasonable framework to replace the existing practice that has worked for decades.

MFA considers the FCA's position that the effect of the announcements on the firms or individuals under investigation is effectively irrelevant to its assessment process to be unreasonable and quite possibly unlawful.

We have set out our responses to the relevant questions in the Annex hereto.

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[2] As reported by Therese Chambers, Joint Executive Director of Enforcement and Market Oversight, to the City & Financial Global Market Abuse and Market Manipulation Summit on February 27, 2024, and as reported by Reuters (https://www.reuters.com/world/uk/uks-fca-plans-lift-veil-investigations-early-discourage-misconduct-2024-02-27/), approximately 65% of FCA investigations currently close without any further action being taken.

We appreciate your consideration, and we would be pleased to meet with the FCA to discuss our comments. If you have any questions about these comments, please do not hesitate to contact Jeff Himstreet (jhimstreet@mfaalts.org) or the undersigned (jhan@mfaalts.org).

Sincerely yours,

/s/ Jennifer W. Han

Jennifer W. Han

Executive Vice President,

Chief Counsel & Head of Global Regulatory Affairs

Annex

Question 1: Do you agree with our proposal to announce our investigations, including the names of the subjects, and publish updates on those investigations, when in the public interest? Please give reasons for your answer.

MFA does not support the proposals, as presented in CP24/2, that the FCA adopt a policy to publish the names of firms under investigation.[3] The FCA's proposals represent a material shift in approach that is inconsistent with that of a financial regulator in a major global financial centre. Apart from the Monetary Authority of Singapore, the FCA has not identified any other financial regulator that publicly identifies subjects of ongoing investigations. MFA is gravely concerned of the impact on firms and individuals of such public announcements and sets out below a discussion of the relevant concerns. MFA considers that the FCA's proposals in CP24/2 would materially and adversely affect the competitiveness of the UK as a jurisdiction of choice for investment firms.

MFA notes that the FCA contends[4] that "*[e]ven when our investigations lead to no public regulatory or other outcomes, we consider that firms we regulate would benefit from a greater understanding of the types of suspected misconduct and other failings we consider should be investigated*." MFA respectfully disagrees with the suggestion that the appropriate way to communicate the areas of focus for the FCA at a given time us by publishing the identities of the firms under investigation.

The FCA also states that "*[p]ublic concern about whether we are taking appropriate steps can develop in this gap* [between the FCA commencing an investigation and announcing the outcome of its enforcement action]*, which can also undermine the educational value and deterrent impact of those outcomes*." MFA considers that, given the large proportion of FCA investigations that are concluded without the FCA in fact taking enforcement action, the public may be unable to appropriately conclude what meaningful action the FCA has taken.

Further, by publicising early-stage investigations the FCA may create a public perception that enforcement action will follow. In addition to the severe prejudice to firms' reputation, this could also create pressure on the FCA to take enforcement action on a highly publicised investigation, where it may not have decided to take such action in the absence of the public attention.

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[3] Whilst the FCA's proposals are clearly most concerning in relation to firms, and the FCA states that its proposal is "*usually not to announce that [it is] investigating a named individual*" (CP24/2), the FCA also states that "*there will be circumstances when [it] can lawfully make such an announcement in the public interest*" (CP24/2, page 15, paragraph 3.18). MFA does not support any proposals to change the FCA's approach to naming firms and individuals under investigation without significant safeguards. For the purposes of this response, MFA's objections are to any changes in relation to firms or individuals, though with a focus on firms since this is the most drastic change proposed.

[4] CP24/2, page 5, paragraph 1.4.

The FCA appears to be of the view that by consistently issuing investigation announcements, it should be able to mitigate the prejudice to the firms as the public would come to appreciate that a large proportion of investigations may not lead to enforcement. However, the FCA cannot control the content of speculative press coverage or the scale of media attention a firm may receive following an announcement. The adverse consequences (discussed below) are likely to be significantly amplified by cases that attract media attention, regardless of the facts of the investigation or whether the firm subject to speculative press coverage is ultimately found to have engaged in any misconduct.

Significant investor redemptions and other adverse consequences

MFA members are very concerned that, because of a public announcement by the FCA that an identified firm is under investigation, investors, lenders, and counterparties, as well as other market participants, are incentivised to redeem investments, terminate advisory relationships, and cease trading and/or financing relationships. Ceasing trading or financing relationships could have an immediate impact on the named firm's investment strategy. While investor redemptions may not be immediate, they may play out over several calendar quarters as alternative asset managers manage redemptions pursuant to contractually agreed-upon limits.

MFA members manage alternative assets with sophisticated, institutional parties as their investors. These investors, which include pension funds, endowments, foundations, and central banks, are often advised by consultants and other professional fiduciaries. There is a real concern that these consultants, upon the publication of a mere *investigation* would advise their clients (the institutions investing in alternative funds) to withdraw their investments – all based on an investigation that, according to the FCA's own statistics, result in a no finding of a breach of applicable rules more often than not.[5] Further, such decisions to redeem may also be a result of investors considering the likely reactions of other investors, potentially creating an unexpected increase of redemption requests across the investor base.

It is highly likely that this would also result in several additional adverse consequences to firms, regardless of whether the firm is ultimately found to have committed any wrongdoing or breached any of the FCA's rules or principles. We discuss these adverse consequences below in detail. Were the FCA to adopt the new policy as proposed, it does not require considerable imagination to anticipate a legal challenge in any instance in which the FCA sought to name a firm or individual.

Such adverse consequences are likely to persist for the duration of the investigation, the duration of which oftentimes spans several years. The adverse consequences suffered by a firm over a prolonged period, including where the ultimate outcome is a finding of no wrongdoing, can be severe and may impair

[5] As reported by Therese Chambers, Joint Executive Director of Enforcement and Market Oversight, to the City & Financial Global Market Abuse and Market Manipulation Summit on February 27, 2024, and as reported by Reuters (https://www.reuters.com/world/uk/uks-fca-plans-lift-veil-investigations-early-discourage-misconduct-2024-02-27/), approximately 65% of FCA investigations currently close without any further action being taken.

the operation of the business to such an extent that it may not be viable to continue it at the same scale, or at all.

Further, the reputational damage caused to firms that ultimately are not found to have breached any rules or principles, or that are found to have committed minor breaches where the investigation initially focused on allegations of serious wrongdoing, will long outlast the end of an investigation, even if the FCA makes a subsequent public announcement confirming it has not made a finding of any wrongdoing.

The adverse consequences may include:

- a significant, sudden increase in redemption requests from existing investors or termination notices from existing clients and investors;
- material obstacles in attracting new investors or new clients;
- material obstacles in establishing new counterparty or trading relationships;
- an adverse impact on borrowing or other lending arrangements (i.e., lenders will raise rates and the cost of financing due to a perceived increased credit risk *solely* because of the publication of the investigation);
- depreciation of the market price of publicly traded firms (or firms with publicly traded parent undertakings); and
- difficulties in staff recruitment and retention.

A significant increase in redemption requests from existing investors or termination notices from existing clients

A significant increase in redemption requests from investors is likely to result in unplanned disposal of investments, including securities traded on UK public markets, to allow the firm to meet redemption requests. While firms undertake such disposals consistent with any legal obligations, large disposals of securities are likely to contribute to market price depreciation and negatively impact private fund investors – namely, foundations, endowments, and pension funds.

Further, while alternative funds manage liquidity risk through contractual redemption limits and notice periods, if a fund had to dispose of assets in an unplanned manner to honour redemption rights, the assets may be sold at a lower price that the firm might otherwise achieve to the disadvantage of fund investors. If fund investors are disadvantaged, then their beneficiaries are as well, and these include pension fund beneficiaries and the charitable purposes of foundations and endowments. The naming of firms subject to mere investigation thus affect investors in the wholesale markets and (directly and indirectly) the consumer markets.

If multiple firms were publicly named by the FCA, the collective action of these firms all seeking to meet redemption requests could create or exacerbate broader risks. Similar considerations would apply to managed accounts or sub-investment management relationships, which may be terminated at will.

Further, with respect to issuers listed or publicly traded in London (and elsewhere), a key precondition for the growth and success of issuers is the ability of their long-term investor base to support them and a stable regulatory environment. Stability is enhanced by creating a regulatory environment designed to minimise abrupt, unforeseen market events. The Consultation falls considerably short in this regard.

MFA considers such consequences, caused solely by the FCA's policy choices with this Consultation, to be incompatible with the FCA's statutory operational objective of integrity, including the orderly operation of the financial markets. For this reason alone, the proposals in CP24/2 must be withdrawn.

Erosion of confidence in the regulatory relationship

MFA notes that the FCA itself has acknowledged[6] that a clear confidentiality restriction encourages the free flow of information to the FCA. If the proactive self-reporting creates a risk that sensitive information regarding a preliminary investigation will be made public, firms may be less willing to continue to operate on the transparent and open basis which has been a key characteristic of the UK regulatory environment. This may limit the FCA's ability to receive timely and unfiltered information from firms and may disincentivise firms from bringing information to the FCA's attention as readily as firms might otherwise have done.

Negative impact on other regulatory relationships

Many MFA members are subject to regulatory oversight by a number of financial regulators. The publication of potentially non-material investigations creates pressure on such other regulatory relationships and may compromise regulatory applications. The impact on other regulatory relationships is particularly pressing in circumstances where there is significant media coverage and speculation in response to an FCA announcement of the firm being subject to investigation.

Material obstacles in attracting new investors or new clients

A public announcement of an investigation by a major financial regulator, such as the FCA, will generally constitute a "red flag" item on any due diligence process by an investor. This means that a significant number of investors will decline or block a new investment or increasing an existing investment with a firm under investigation.

Inability to respond to or communicate regarding the FCA's announcement. The FCA's proposals do not contemplate the ability of the firm under investigation to respond to the FCA's public

[6] FCA website, "Freedom of Information – What we can share".

announcement either publicly or in private discussions with investors. Presently, the ability of a firm under investigation to communicate with investors regarding ongoing investigations is severely curtailed. Without a clear ability to respond to, explain or provide further context to the FCA's announcement of an investigation, such an announcement inevitably will affect a firm's relationship with investors to such an extent that some relationships may suffer long-term or permanent damage.

Negative investor due diligence implications. Investors are likely to be alarmed by an announcement of an investigation and may be unable to determine conclusively their risks and obligations under anti-money laundering or counter-terrorism financing laws, or their obligations as a fiduciary or under applicable professional standards. This means that the most cautious approach for many investors will be to not commit to invest with a firm under investigation, even though at the time the disclosure was made, the firm would not have been found to have engaged in any misconduct.

Implied indication of wrongdoing. Although the FCA notes that an announcement should not be taken to imply that it has reached any conclusion that there has been a breach or other misconduct or failing or even that it will result in enforcement action, MFA is concerned that the announcement identifying a firm may in some cases be taken by investors to indicate that there is a real prospect that a breach or other misconduct or failing has in fact taken place. The FCA's stated aim of protecting the interests of consumers by identifying a firm under investigation is, in fact, premised on this implied understanding that investors will react sceptically to the named firm or individual. As it may be years before a firm is able to reassure its investors that, in fact, no misconduct ever resulted from the FCA's investigation publication, the proposals create a long-term material impediment to alternative asset managers raising capital and managing investment funds for the benefit of their institutional investors, regardless of the outcome of the investigation.

Material obstacles in establishing new counterparty relationships

Similar to the considerations above regarding investors, a public announcement by the FCA regarding an investigation concerning a firm will be alarming to market counterparties.

A public announcement of an investigation by a major financial regulator, such as the FCA, will generally constitute a "red flag" item on any due diligence process by a financial institution with which a firm wishes to transact as a counterparty, for example in OTC derivative transactions. Non-UK dealers may react more adversely as they may be less familiar with the FCA's unparalleled approach of naming individuals and firms under mere investigation. To the extent they are wiling continue existing trading and financing relationships, dealers may require more onerous contractual terms, higher margin rates, and less-forgiving margin deadlines – all to manage what the dealer incorrectly perceives as an increased credit risk of the named firm or individual resulting *entirely* from the FCA's unilateral decision to publish the names and details of an investigation, regardless of whether the investigation results in any action.

Even if the FCA investigation results in no finding, as many do, the damage to counterparty relationships – and by extension – business prospects, will already have been done. The increased operational difficulties will mean that the processing time of establishing new counterparty relationships

may be significantly lengthened, and in some cases, counterparties will not approve a firm that they know is under investigation. If the firms is later found *not* to have engaged in any misconduct, then it would be necessary to amend their trading documentation, which itself can take months of legal and operational staff time.

Inability to respond to or communicate regarding the FCA's announcement. The FCA's proposals do not contemplate the ability of the firm under investigation to respond to the FCA's public announcement either publicly on in private discussions with stakeholders. Presently, the ability of a firm under investigation to communicate with third parties regarding ongoing investigations is severely curtailed as firms are generally required by the FCA to adhere to strict confidentiality requirements concerning an ongoing investigation. Without an ability to respond to, explain or provide further context to the FCA's announcement of an investigation, such an announcement is likely to affect a firm's business relationships to such an extent that it may not be possible to establish some counterparty relationships.

It is common due diligence practice that investors and consultants regularly ask investment managers whether they are the subject of a current regulatory investigation. The proposals provide no confirmation that the firm would be able to respond to such inquiries from investors or other stakeholders and provide a meaningful explanation of the nature and scope of any investigation. The manager's ability to provide this important context is hindered by the lack of clarity regarding the scope of disclosure which would be permitted.

Implications for counterparty compliance and due diligence. Counterparties are likely to be alarmed by an announcement of an investigation and may be unable to determine conclusively their risks and obligations under anti-money laundering or counter-terrorism financing laws, or their obligations as a fiduciary or under applicable professional standards. This means that the most cautious approach for many counterparties will be to cease existing and not enter into new trading and financing relationships with a firm under investigation. Again, this may be particularly the case with respect to counterparties outside the UK, creating potentially significant challenges for FCA-authorised firms to access markets in the US, Europe, Asia and elsewhere. UK-based dealers often do not have direct access to these markets or must work through affiliates based in such non-UK jurisdictions, which only serves to increase operational risks and costs.

As discussed above, a public announcement identifying a firm under investigation creates a long-term material impediment to a firm seeking to carry on its business, regardless of the outcome of the investigation.

Adverse impact on borrowing or other lending arrangements

A public announcement that a firm is under investigation may result in the risk profile of the firm being adjusted higher by its lenders, resulting in higher borrowing costs and less advantageous terms. The adverse impact of this will be compounded over time, and especially if the firm wishes to access borrowing to fund its business and where the ability to raise capital and increase revenue has been curtailed, as discussed below.

Depreciation of the market price of publicly traded firms (or firms with publicly traded parent undertakings)

An unintended impact of public announcements identifying a firm under investigation would be the price impact on the share price of publicly traded firms, or firms that have a publicly traded parent. Although there are circumstances in which a publicly traded firm may make a public announcement regarding an investigation, it is unusual for a publicly traded firm to make such an announcement when an investigation is opened, or where the firm considers it is well-positioned to defend or repudiate any allegation of wrongdoing. Any announcement is generally made at a point when the firm considers there to be sufficient grounds for disclosure, subject to prior discussion with the FCA.

An early announcement of an investigation with a necessarily uncertain conclusion, which may continue over a number of years, will likely create a long-term drag on the share price, unfairly and unnecessarily depleting value from the share price over a prolonged period. Certain market participants also may enter into short positions against issuers identified in any FCA publication, even though there has been no change to the firm's profitability or business. In such cases, increased short interest would be brought about solely by the FCA's public announcement of an investigation as set out in the proposals. This, we suggest, is inappropriate.

Macroprudential risk

MFA wishes to highlight the potentially adverse impact of the FCA's proposed policy on issuers. As discussed above, the consequences of reputational damage on investment managers who represent a significant portion of the investor base of issuers with securities publicly traded in London and elsewhere in the world, as well as issuers of sovereign debt, is considerable. A key expectation of issuers is the ability of their long-term investor base to support them, and a stable regulatory environment designed to minimise abrupt market events. MFA is concerned that the proposals would compromise the effective and orderly operation of markets, and strongly suggests that the FCA withdraw the proposals under the Consultation Paper in their entirety.

Difficulties in staff recruitment and retention

Presently, a firm under investigation would, and would be required to, keep the investigation confidential and only a restricted number of individuals in the firm would be aware of the investigation. As a result of a public announcement identifying the firm under investigation, firms would likely experience material challenges in seeking to retain and to recruit staff, particularly senior professionals and legal and compliance staff.

The perception of the firm's risk profile (as an employer) and the reluctance of some staff members to be associated with the firm for fear of suffering reputational damage by association will increase staff retention and recruitment costs and will likely lead to loss of staff even if compensation is increased. Firms may be required to pay higher recruitment and retention costs for qualified staff, particularly compliance, risk management and legal staff, as the employees will expect a "risk premium" in the form of above-

market compensation to associate with a firm that has been publicly named by the FCA as being under investigation. As staff costs often represent a significant proportion of the operational overheads of an investment manager, the increased cost burden would operate as an *de facto* penalty on a firm before the FCA has reached any findings of wrongdoing, even preliminarily.

These difficulties will further exacerbate the difficulties a firm may face, as discussed above, and will further destabilise a firm's ongoing operations at a time when investors, clients and other stakeholders will be closely following the firm's performance and examining changes in its key staff and operations.

Question 2: Do you agree with the structure and content of our proposed new public interest framework, including the factors proposed, and the other features of our proposed new policy described in paragraphs 3.5 to 3.12 above? Please give reasons for your answer if you do not agree.

MFA does not agree with the structure and content of the FCA's proposed new public interest framework or with the other features of the proposed new policy described in paragraphs 3.5 to 3.12 of CP24/2. The FCA should withdraw the proposals in the Consultation Paper.

Broadly applicable policy inappropriate and unnecessary. Firstly, the proposed policy, which effectively adopts a presumption that a public announcement is made unless it is indicated that the announcement would not be in the public interest, is thoroughly flawed in approach and process for several reasons.

Were the proposals reintroduced, the appropriate presumption should be for the FCA not to make a public announcement which identifies the firm under investigation, unless there are compelling public interest grounds to justify such disclosure. While in the context of advice or other services provided to consumers there may be specific circumstances in which publication of the name of the firm under investigation may be needed to protect consumers or to achieve other objectives, the proposals should be limited to such circumstances, As currently presented, the proposals affect the market as a whole and will likely have serious consequences for firms without any consumer protection benefit.

Public interest framework flawed and incomplete. Secondly, the public interest framework articulated in CP24/2 fails to include in the public interest framework any consideration of the likely impact on the firm and any assessment of whether the disclosure is proportional in given circumstances. MFA considers this approach unreasonable and likely inconsistent with the standards applicable to the FCA as a public body.

MFA notes that in paragraph 3.8 of CP24/2 the FCA recognises "…*that this more transparent approach may raise concerns about potential impact on our investigation subjects. We have, however, not included such impact as a specified factor in our proposed framework. This is because we consider that assessing if publication of an announcement or update is in the public interest should, while taking account of all relevant facts and circumstances, be primarily focused on promoting our statutory objectives. It*

should support the relevant investigation and increase our accountability by providing public reassurance that we are acting in the interests of consumers and investors." In other words, the FCA would determine the "public interest" as set out in the proposals wholly without consideration of the impact on the firm or its stakeholders. The proposals will severely detract from the competitiveness of the UK as a financial centre, including for firms with large offices in London with thousands of employees.

MFA considers that the distinction the FCA has sought to draw between the interests of investors and those of the firms under investigation does not accurately reflect the more nuanced reality of overlapping interests. The FCA does not seem to have appreciated the way in which the consequences of the reputational damage to managers will reverberate through the investor community whose interests may be adversely affected by counterparties reassessing risk based solely on the FCA's publication of an investigation or other difficulties which the vehicles they have invested in will be exposed to because of the reputational damage on the manager. Increased operational costs caused by reputational damage will in part be borne by investors, in the form of higher margin rates, decreased borrowing capacity, or an increase in collateral requirements. A counterparty's perception of a firm under investigation therefore is likely to compromise the firm's ability to effectively carry out its investment function for the benefit of fund investors. In addition, firms may experience an inability to attract high-calibre staff, which itself may have an impact on performance and may result in increased administrative or operational errors.

Further, MFA considers that the FCA's assertion that it is not relevant or necessary to include a specified factor considering the potential impact on the investigation subject is erroneous and inconsistent with the standards applicable to the FCA as a public body, regardless of the scope of its statutory objectives.

Response period inadequate. Thirdly, the FCA has proposed a 24-hour period for firms to make representations to the FCA, which is a wholly inadequate time period for most professional organisations to consider and prepare a response to an issue of such severity. It is unclear what the purpose of the time period is, but presently it provides no meaningful opportunity for a firm to consider the announcement or how to react to it. Firms often operate in an international context, with obligations to make public disclosures, notify other regulators and engage with investors and other stakeholders across jurisdictions. As many firms also operate across a number of different geographic locations and time zones, a 24-hour period does not allow time for adequate internal consultation needed to allow firms to respond appropriately, establish facts and explain and evidence any discrepancies or mistakes in the content of the FCA's proposed announcement.

Absence of mechanism to allow correction or revision of content. Fourthly, the proposals include no clear process for the firms to engage with the FCA nor describe what actions the firms may request the FCA to take, and no mechanism to delay publication, provide comments to, highlight inaccuracies in, or revise the content of the announcement. As drafted, the proposals leave little choice to a firm but to seek an injunction against the FCA when notified of the announcement if the firm considers the announcement to be deficient or inaccurate in some material respect and the FCA does not otherwise engage with the firm. MFA deeply regrets the absence of an engagement mechanism with firms in respect of public

communications that will be potentially highly impactful to firms' ability to carry on their business during an investigation.

Lack of clarity regarding firms' confidentiality obligations. Fifthly, the proposals do not contemplate or allow for the needs of firms to communicate with their investors, clients, or other stakeholders and, while the proposals in effect allow the FCA to waive the confidentiality of the investigations, they do not make any provision to allow firms to respond publicly or privately to the FCA's announcement or describe the scope of information they may provide. This makes it needlessly difficult for firms to have open and frank discussions with relevant stakeholders and may exacerbate an unexpected and difficult situation, even where a firm is confident it has not engaged in any wrongdoing.

Failure to consider applicability and relevance of confidentiality standards. Finally, the FCA appears not to have sufficiently considered that the existing statutory powers (which, among other things, permit them to make public announcements of preliminary findings at the stage of a Warning Notice Statement) specifically contemplate the process by which the FCA is permitted to make public statements regarding investigation subjects before the conclusion of an investigation. For example, section 391(6) of the Financial Services and Markets Act 2000 (FSMA) provides that "*the FCA may not publish information… if, in its opinion, publication of the information would be (a) unfair to the person with respect to whom the action was taken (or was proposed to be taken)* …".

Even at the stage of preliminary findings, the FCA's ability to publish information is restricted by statute and carefully cabined. As the threshold for opening an investigation is much lower than reaching preliminary findings (for example, only that it "*appears*" that there is "*good reason*" to commence an investigation)[7], the proposal to publish anything at this stage seems to suggest that the FCA is expanding the existing statutory regime at its own initiative and subject to its own assessment framework without affording consideration to the statutory protections firms are afforded once preliminary findings have been made.

Question 3: Do you agree with our approach to announcements and updates where the subject is an individual? Please give reasons for your answer if you do not agree.

MFA disagrees with the FCA's approach to announcements with respect to the new proposals to name individuals. MFA again urges the FCA to withdraw the proposals in the Consultation Paper. In addition, MFA wishes to highlight the effect on individuals in certain cases if a firm is named.

[7] Section 167, FSMA.

The proposals to name individuals

MFA understands that the FCA is proposing to only name individuals under investigation in exceptional circumstances.

As the FCA is aware, an individual's right to privacy has been recognised at common law and under the European Convention on Human Rights (ECHR), and in each case would need to be satisfied that its legitimate interest to name an individual is law and not disproportionate, taking into consideration the interests of the individual.

The UK General Data Protection Regulation and the Data Protection Act 2018 also enshrine protections for individuals. A recent judgment of the Supreme Court[8] is instructive that in criminal cases a person generally has a reasonable expectation of privacy in relation to information relating to that investigation prior to being charged. Arguably, in an administrative proceeding the expectation will be at least as strong, if not stronger. Other relevant factors MFA would expect the public interest framework to include, especially with respect to any identification of individuals, include whether a matter is already public or subject to speculation.

As the public interest framework does not appear to establish any factors for the consideration of individuals' interests, MFA considers it doubtful that a decision to identify an individual under investigation following an assessment under the public interest framework would be lawful.

The public interest framework also fails to consider a need for different assessment basis in criminal and civil investigations, even though each clearly may represent a different "public interest". The FCA's statements that all the circumstances will be considered on a case-by-case basis provide an inadequate explanation as to how the assessment would in fact be carried out and render the process opaque, which seems to contrast with the overall objective of enhanced transparency the FCA espouses in CP24/2.

The effect on individuals if a firm is named

If the FCA names a firm under investigation, in many cases the identification of the firm would be tantamount to identifying individuals associated with that firm. The harm an individual would suffer would be significant and prolonged as the conclusion of an investigation may take several years. In particular:

- some firms are synonymous with specific individuals, *e.g.*, founders or chief executives.
- senior members of the compliance, legal and risk management teams will likely be inherently prejudiced as most investigations will also focus on the compliance and risk management functions.
- depending on the content of the announcement, other individuals in particular groups or departments may also be implicitly identified and prejudiced. The subject matter of the investigation

[8] *Bloomberg v. ZXC* [2022] UKSC 5.

will often further suggest which individuals are likely to be under investigation, *e.g.*, the chief investment officer or portfolio managers of certain strategies.[9]

As such, any announcement that a firm is under investigation (or updates thereto) will generally undermine certain individuals' rights of privacy. The reputational damage that firms will suffer will also affect individuals' career progression, ability to move roles or professional standing more generally. The proposals are premised on an artificial distinction between publishing information relating to an investigation of a firm and publishing information relating to an investigation of an individual and fail adequately to consider the impact on individuals of a public announcement concerning a firm under investigation. The proposals unfairly prejudice individuals associated with a firm and will create a significant deterrent for high-calibre professionals to accept employment at an FCA-authorised firm.

Question 4: Do you agree with the proposed content of our announcements? Please give reasons for your answer if you do not agree.

MFA does not agree, and repeats its response in relation to questions 1, 2, and 3. MFA also notes with significant concern that the FCA seeks to apply the new policy retrospectively. This change is contrary to the legitimate expectations of firms under investigation. Where the FCA has specific concerns for consumer protection with respect to particular firms under investigation it has other intervention powers at its disposal and is not restricted to making a public announcement as its sole consumer protection measure.

The MFA notes that even the current practice by which the FCA names investigation subjects in exceptional circumstances has no clear legal basis. MFA urges the FCA to withdraw the proposals in CP 24/2.

Question 5: Do you agree with our proposed methods of publicising an announcement and updates? Please give reasons for your answer if you do not agree.

MFA does not agree that the FCA should publish investigation summaries listing firms and individuals and therefore has no comment as to the proposed methods of publicising an announcement and updates.

[9] *See, for example*, *Financial Conduct Authority v. Macris* [2017] UKSC 19.

Question 6: Do you agree with our proposed approach to publicising investigation updates, outcomes and closures? Please give reasons for your answer if you do not agree.

MFA does not agree with the proposed approach to investigations, outcomes, and closures. MFA repeats its response in relation to questions 1, 2, 3 and 4, and urges the FCA to withdraw the proposals in CP 24/2.

Question 8: Do you have any comments on the revised content of chapters 1-6 of EG?

MFA objects to proposed paragraph EG 2.7.3 and any suggestion that the FCA may pre-empt an individual's choice of legal advisor. MFA strongly supports high professional and ethical standards for legal advisors. Legal advisors are subject to their own fiduciary, regulatory and professional ethical obligations in relation to conflicts of interest. Any assertion by the FCA that the chosen legal advisor is in breach of their duties is a serious accusation of professional misconduct. If such circumstances should arise where the FCA has concerns, the guidance should ensure that the FCA raise this with the legal advisor in good time beforehand or postpone the interview (particularly if it is proceeding using compulsory powers) until such time as the issue has been resolved and/or that the individual can be represented in the interview. To do otherwise would constitute a breach of the individual's rights to appropriate legal representation.

Question 13: Do you agree with the removal of the restitution chapter from EG? Please give reasons if you do not agree.

MFA is concerned that the FCA's justification for this removal is that most redress schemes are agreed and therefore, as a result, guidance is unnecessary as to what would happen if it were not agreed. This this position appears illogical and should be reconsidered.

Question 16: Do you have any comments on our proposed approach to future consultation?

MFA disagrees with the FCA's position on future consultation and again urges the FCA to withdraw the proposals in the Consultation Paper.

Under section 1K FSMA, the FCA "*must*" give guidance "*about how [the FCA] intends to advance its operational objectives in discharging its general functions*". It therefore is clear under FSMA that the FCA must provide guidance in relation to its enforcement activities, which are a crucial part of discharging its

general function. This general guidance – including EG – is issued under section 139A FSMA. As such, MFA disagrees with the FCA that EG is "*not required*".[10]

Under section 1M FSMA, the FCA "*must make and maintain effective arrangements for consulting practitioners and consumers on the extent to which its general policies and practices are consistent with its general duties under section 1B*". As such, MFA does not think it correct to state that the FCA is not under a duty to consult. Further under section 3B(1)(h) FSMA, the FCA is required to abide by the principle that it "*exercise a function as transparently as possible*", and this is further buttressed by the Legislative and Regulatory Reform Act 2006.

MFA considers the FCA's emphasis on the importance of transparency (even in circumstances which MFA considers inappropriate and contrary to law) contradictory to its proposal to remove the scrutiny of itself when such consultation and consideration is appropriate and required.

[10] CP24/2, page 22, paragraph 4.27.