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

Dear Sir / Madam,

CP24/2 Part 2 – Greater transparency for our enforcement investigations

The City of London Law Society ("**CLLS**") represents approximately 17,000 City lawyers through individual and corporate membership, including some of the largest international law firms in the world. These law firms advise a variety of clients from multinational companies and financial institutions to Government departments, often in relation to complex, multi-jurisdictional legal issues. The CLLS responds to a variety of consultations on issues of importance to its members through its specialist committees.

This response has been prepared by the CLLS Regulatory Law Committee (the "**Committee**" or "**we**"), a list of whose members can be found on the CLLS website. The Committee not only responds to consultations but also proactively raises concerns where it becomes aware of issues which it considers to be of importance in a regulatory context.

We refer to our response to the FCA's consultation paper CP24/2 (the "**Initial Consultation**") in which we made submissions concerning the FCA's proposal to publicise the existence of enforcement investigations (the "**Original Proposals**") and expressed our material concerns with, and objection to, the FCA implementing the Original Proposals. An executive summary of our response to the Initial Consultation is attached as an appendix to this letter. This response is in relation to CP24/2 Part 2. We note that the FCA has now addressed peripheral aspects of our concerns, but the Committee continues to have material concerns on the substance. These include the following:

- **Conflation of factors which justify anonymised disclosure with those which justify non-anonymised disclosure:** In explaining how the FCA would approach consideration of whether to disclose the existence of an investigation, the FCA conflates factors which justify anonymised disclosure with those which justify non-anonymised disclosure. The FCA claims that publishing the existence of an investigation and naming the firm would "provide an educational benefit for firms and market users to understand the types of conduct [it is] investigating and could drive better compliance with [the FCA's] rules and other requirements".[1] There is extremely limited "educational benefit" from making a non-anonymised disclosure aside from it being a route to demonstrate that the FCA has a particular focus on a specific area. We recognise that there may only be a handful of cases – typically where issues that have arisen are egregious and specific to one firm only – in which there may be meaningful educational benefit from making non-anonymised announcements about the

[1] Paragraph 4.10 of CP24/2 Part 2

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investigations. Otherwise, enforcement-led educational benefit comes from final notices at the end of the investigations once the facts and consequences are clear.

- The specimen announcements used in the case studies – for which the FCA considers non-anonymised disclosure would be justified in all four sets of circumstances – are very high-level, offering limited information and educational value. It is improbable that any of the FCA's four posited statements contains sufficient information to enable another firm to understand the issue, let alone to improve its processes.

- In Case Study 4 (CB Payments Limited), the principal justification for naming Coinbase in the announcement appears to be that the FCA could demonstrate its focus in a novel and developing area (i.e., crypto trading). There is a reasonable challenge as to whether that message could be effectively communicated without naming the firm. While educational benefit for firms and market users may justify anonymised disclosure of the existence of a major case (or series of smaller cases) centred around a theme (e.g. in Case Study 4), it does not justify non-anonymised disclosure.

- The examples given by the FCA in CP24/2 Part 2 to demonstrate circumstances in which non-anonymised disclosure would be suitable (retail advice, trading errors, auditing and crypto trading) are indistinguishable from the examples which are considered suitable for anonymised disclosure (AML, cyber, market abuse and systems and controls). In principle, the public interest framework should not operate to permit non-anonymised disclosure in circumstances where, for example, educational benefit can effectively be provided for firms and market users through anonymised disclosure.

Consumer protection does not justify non-anonymised disclosure if it can be achieved in a more targeted fashion and without naming the firm under investigation, such as through the FCA's existing power under s55L FSMA to compel a firm to make a specified communication with each of its existing customers and to restrict a firm from accepting new business.

- In Case Study 1 (British Steel Pension Scheme), the FCA considers that it is justified to name adviser firms X, Y and Z which are under investigation in relation to pension transfer advice given to BSPS members. It would be more proportionate in these circumstances for an anonymised disclosure to be made signalling that the FCA is conducting investigations on various adviser firms, and has engaged with a number of firms requiring them to communicate with their customers about its investigation.

- **<u>FCA governance</u>**: As a safeguard, the FCA intends to ensure that decisions on whether to make an announcement will always be made at the Executive Director level, with the decision-maker having been provided with information about any representations received as well as legal advice from an FCA lawyer who has not been part of the investigation team.[2] We can take no comfort that this will be adequate and sufficiently robust from an FCA governance perspective.

    - There remains a clear concern in the market that if broad powers were to be given to the FCA on announcing investigations and naming firms where the public interest framework is deemed to be satisfied, this could give rise to abuse even if decisions are hard-wired to be made at FCA Executive Director level. There are clearly some situations – which we have referred to in our response to the Initial Consultation – where early disclosure could have a significant impact on both the firm which is the subject of an investigation and on

[2] Paragraph 4.17 of CP24/2 Part 2

the stability of the market. There is no guarantee that the judgement of an Executive Director on whether it is appropriate in a given situation to announce an investigation and to name a firm will in itself provide a robust form of safeguard – as illustrated by the issues arising in connection with the disclosure of the life insurance review in 2014.

- Where decisions to announce relate to a listed company, or where they relate to a market-wide matter, the FCA needs to carefully consider the potential impact of an announcement on a firm, and there is likely a need for the relevant FCA Executive Director to be required to consult or escalate the decision in certain circumstances, for example:

    - escalation to the FCA Board should be hard-wired where an announcement concerns listed groups, or other major matters which could cause market or sector wide impact; and

    - prior consultation with appropriate representatives from the Prudential Regulation Authority and the Bank of England should be required where an announcement concerns PRA-authorised persons. We note that in CP24/2 Part 2, the FCA indicates in Case Study 2 (Citigroup Global Markets Limited) that it "would have … consulted the PRA before deciding whether and what to announce"[3] – but it is not shown in CP24/2 Part 2 that the FCA is willing to hard-code that principle.

- As many firms may not have the resources to mount a High Court challenge (recognising that without legislative change, a legal challenge against a decision by the FCA to announce the existence of an investigation would need to be made by way of an injunction or a judicial review application, rather than an appeal to the Tribunal), it is important that there is proper scrutiny within the FCA of a decision to announce an investigation.

- The FCA indicated that in line with its current policy of streamlining its investigation portfolio by aligning its enforcement approach with its strategic priorities, there would on average only be 10 to 12 new investigations into regulated firms per year. The FCA concludes that the revised proposals will only affect a very limited number of regulated firms each year. That may be the case under the current policy – however, like any organisation, FCA leadership may change over time, and with that so too may the FCA's approach to running its enforcement portfolio. The suggestion that only 10 to 12 regulated firms per year may be subject to an announcement is of no great comfort.

- Finally, if broad powers were to be given to the FCA, over time it may become more acceptable for the FCA to use such powers. Proper and effective governance must be put in place in relation to a policy of this nature (recognising that, as discussed in our response to the Initial Consultation, any decision to announce the existence of an investigation into a firm could cause material detriment to the firm).

- **<u>Extended time periods</u>:** The FCA proposed a 10-business-day period for a relevant firm to review any draft announcements and submit representations, as well as an additional 2 business days' notice if the FCA decides to proceed with publication. The extended time

[3] Paragraph 5.18 of CP24/2 Part 2

periods may on the surface appear helpful, but in many cases they will still be too short, given that listed groups may need to go through internal governance.

- The FCA should have discretion to extend the period of notice in some cases (and particularly where the representations from the affected firm make clear that the decision should be an FCA board matter and not left to an Executive Director).

- The FCA should communicate at the earliest opportunity (e.g., at scoping meeting or shortly after) whether it believes that a case would be a candidate for early publication, giving reasons why and allowing – from that early stage and therefore with scope and time – the firm to make representations to the contrary. Firms should also be allowed to make representations from the point of notification up to the point in which a final decision has been reached on disclosure.

- Based on the examples given by the FCA, the types of cases the FCA has in mind for non-anonymised disclosure are situations where there are material issues or systemic issues. These are therefore cases for which the FCA would know from the outset that the cases fall into the potential early disclosure category. Where the FCA believes a case would be a candidate for early publication, informing firms at the earliest opportunity would allow firms the time to put together a properly informed set of representations.

- **<u>Representations from firms potentially affected by an anonymised announcement</u>:** The FCA should communicate to potentially affected firms where it proposes to make an anonymised announcement that has a specific sector-wide focus, and to allow for representations to be made by firms which will potentially be affected by the anonymised announcement. The issues arising in connection with the disclosure of the life insurance review in 2014 illustrate that even without specific firms having been named in the relevant press publication, disclosure of information which relates to a specific sector-wide focus could nevertheless have a severe adverse impact on the whole market. Where the FCA is proposing to make an anonymised announcement, it should notify firms which could potentially be affected and allow for representations to be made from those firms.

- **<u>The UK's international standing</u>:** The FCA refers to the UK's global prowess and its reputation as a stable place to do business in CP24/2 Part 2. It acknowledges that announcing investigations will make it an outlier, for which its justification is singularly unconvincing. It is surprising that the FCA makes no reference in CP24/2 Part 2 to how the revised proposals are compatible with its secondary international competitiveness and growth objective. The House of Lords Financial Services Regulation Committee's report on CP24/2 Part 2 highlights that it "remained unconvinced by the explanation offered by the FCA on how the proposals align with its secondary international competitiveness and growth objective"[4] and found that the revised proposals risk positioning the UK as an outlier.[5] As the revised proposals impact how the FCA determines its general policy for performing a particular function,[6] consideration should have been given to whether the revised proposals are compatible with the secondary international competitiveness and growth objective.

[4] Paragraph 78, House of Lords (Financial Services Regulation Committee) First Report of Session 2024-25: Naming and shaming: how not to regulate
[5] Paragraph 88, House of Lords (Financial Services Regulation Committee) First Report of Session 2024-25: Naming and shaming: how not to regulate
[6] Section 1B (6)(d) of FSMA

- **Greater transparency on investigations into unregulated firms:** In CP24/2 Part 2, the FCA makes the point of bringing greater transparency into cases involving unregulated firms. We agree that this is an area where early publication to address potential consumer harm would be helpful.

Closing Remarks

Having considered the revised proposals, the Committee is of the view that the concerns we expressed in our response to the Initial Consultation have not been fully addressed. As noted in this response, the Committee retains material concerns on these revised proposals set out in CP24/2 Part 2, and does not support the revised proposals being implemented in their current form.

We hope the above feedback will be useful to you. If you would like to discuss any of these comments then we would be happy to do so. Please contact Hannah Meakin by telephone on +44 (0)20 7444 2102 or by email at hannah.meakin@nortonrosefulbright.com in the first instance.

Yours faithfully

Hannah Meakin
Chair, CLLS Regulatory Law Committee

Appendix - Executive Summary of our response to CP24/2 – Our Enforcement Guide and publicising enforcement investigations – a new approach

Our Response: Headline Observations

The Committee's response to CP24/2 focuses on Chapters 2 and 3, which together set out the proposed new approach to publicising the existence of enforcement investigations. The Committee has no substantive comments on the other proposals made to revise the Enforcement Guide.

In summary, the Committee has material concerns with the FCA's proposed new approach and does not support the proposal being implemented. We consider that the policy as presented is ill-conceived, lacks justification, and, if implemented as envisaged, is likely to risk undermining confidence both in regulated firms and the FCA as an institution. It is surprising that the changes are proposed apparently without due consideration of their likely adverse impacts, and without giving due consideration to whether similar objectives could be achieved through proportionate means with less risk to market confidence and integrity. We elaborate on our reasons in this response, but in summary our observations fall under the following headings:

- **Destabilising and undermining confidence in regulated firms and individuals**: The existence of a regulatory investigation into a firm's conduct often has a material adverse impact on market (and potentially also consumer) confidence in a regulated firm, and can impact the stability of the firm. The FCA's proposal envisages risking such consequences more often than is currently the case irrespective of the fact that no contravention may have occurred, with the erroneous belief that the market will place weight on a disclaimer in the announcement that no conclusion has been reached that a breach has occurred. In this respect the FCA's proposal fails properly to consider the likely material adverse impacts on firms, to recognise that the impacts on confidence will not be mitigated through its proposed disclaimer language, and adequately to consider whether the policy intention could be achieved through alternative or existing mechanisms that would not carry such risks (or at least not to the same degree). While the new policy may not apply in relation to investigations of individuals, it is surprising and concerning that the FCA fails to identify and consider the impact of early announcement of investigations on senior managers of the regulated firms in question, which may be particularly pronounced in listed groups and in smaller firms and sole traders (where individuals have particular prominence).

- **Disproportionate, irrational and justified on false premises**: The FCA's justification for the new approach is based on a desirability for transparency (as a regulator generally, as a tool for effective regulation, as a means of maintaining market confidence and as a deterrent). The FCA fails adequately to assess its perceived potential benefits of increased transparency against the extensive adverse impacts and market disruptive effects that the approach could create, and relatedly fails to consider whether alternative measures and existing regulatory tools and powers could achieve the desired policy effect without causing the harms likely to be caused by this proposal. Others have suggested ways in which firms would find information about the FCA's current concerns and trends arising from their investigations presented on an aggregated and anonymous basis to be more useful and we would suggest this is a more effective approach to transparency. The failure to properly consider relevant factors, combined with the disproportionate nature of the proposal, leaves the use of the proposed approach open to judicial review. We would further observe that "deterrence" and "education" provide particularly limited support and justification, not least given the highly restricted nature of any information likely to be capable of being included in relevant public announcements and the many other deterrence measures that exist in the UK regulatory framework.

- **Adverse impacts on market stability**: In some cases the existence of an investigation, or indeed the FCA's intention to publicise the existence of an investigation, may be market sensitive information. In such cases, it is properly for the relevant listed firm (and not the FCA) to follow its disclosure processes (including through use of a disclosure committee to determine what if any information is or may be inside information requiring disclosure) and to arrange for the release of any inside information in accordance with Article 17 of UK MAR. Where the information is not market sensitive, a listed financial services group may in any event decide or be required to include information concerning a regulatory investigation in their annual report or other public disclosures. Where this is the case, any such decision is taken following thorough governance and oversight, often with consultation with relevant regulatory authorities, and with careful scrutiny and planning for the questions that may arise from investors. The FCA's proposal fails to give due consideration to the risks to market stability of a short notice public announcement of an investigation. The suggestion that some announcements may be made on an anonymised basis (e.g., identifying the relevant market) does not address this issue and, in fact (and as illustrated by the issues arising in connection with disclosure of the life insurance review in 2014), can have a market destabilising effect across many or all firms in a relevant sector irrespective of whether they are the subject of the investigation.

- **Inadequate "public interest" safeguards**: The proposed "public interest" safeguards are broad in scope for justifying publication, while those that may indicate against publication are narrow and specific. This, combined with the commentary in CP24/2, creates the impression that the FCA's approach would be to operate on the presumption that an investigation should be publicised, with there being a high bar to conclude otherwise. Such an approach inappropriately disregards or fails to consider the risks associated with the proposals, including the risk of undermining confidence in the institution(s) under investigation, and exposes the FCA to operating in a disproportionate and irrational manner. Moreover, the proposed new approach disregards without consideration the fact that Parliament has already made clear through the statutory framework the appropriate stage at which, and safeguards that should apply where, publicity of investigation and enforcement action is to be communicated.

- **Adverse impact on international competitiveness:** Committee members have surveyed their global networks to assess whether there is a comparator approach by regulatory authorities outside the UK. We do not believe that there is, which calls into question the FCA's assertion that this policy is compatible with advancing the competitiveness of the UK economy. We appreciate that the international competitiveness and growth objective is secondary but it still needs to be given due consideration. Feedback received from international financial services groups is that this policy change would be a disincentive to operating in London.

- **Undermining confidence in the FCA**: It seems unlikely that the new approach will in fact lead to more efficient and timely case management, not least given that the announcement of the opening of enforcement investigations will result in more questions from the public, the media and Parliamentarians, challenges to the FCA's objectivity and fairness and further criticism both of the length of investigations and the number which are closed without further action. Greater transparency of the speed of conclusion of investigations by the FCA and as to the number and nature of investigation cases that are commenced and subsequently dropped may also serve the contrary unintended consequence of undermining confidence in the FCA.

The Committee recognises that there may be genuinely exceptional cases in which raising awareness of FCA concerns (potentially including the existence of an enforcement investigation) could be appropriate and justifiable, when considered against appropriate safeguards, in furtherance of the FCA objectives. For example, where a clear, material and ongoing retail consumer harm is occurring in a particular area (as was seen, for example, in the case of recent defined benefit ("**DB**") pension transfer misselling) and awareness raising may have the effect of mitigating the risk of continuing harm. This noted, there are other regulatory tools that could be utilised to achieve the desired mitigating effect and, even if publicity of an investigation is necessary, given the exceptional nature of the situations where such action may be justified, we do not consider that these cases warrant additional specific recognition in the Enforcement Guide (at least in the manner and level of detail currently envisaged) and arguably would be captured by the position set out currently in the Enforcement Guide (at EG6.1.6G).

As such, the Committee's firm view is that the proposed new approach should not be progressed in its current form and at least without further industry engagement and consultation regarding the circumstances in which publication may be in the public interest but where the current policy would not allow such publication.