7 February 2025

FIA and FIA EPTA Response to the FCA's Consultation CP24/2, Part 2:

Greater transparency of the FCA's enforcement investigations

The Futures Industry Association (FIA)[1] and The European Principal Traders Association (FIA EPTA)[2] welcome the opportunity to respond to the FCA's public consultation (CP24/2, Part 2) which provides greater transparency and insight into the proposed changes to the FCA's approach relating to investigations, including plans to publicly announce the opening of enforcement investigations, disclosing the identity of the subject of the investigation, and publishing updates throughout the investigation process, where the FCA considers this to be in the public interest.

FIA and FIA EPTA ('The Associations') members welcome this additional step in the consultation process following the FCA's public consultation (CP24/2) in 2024. Furthermore, the Associations appreciate the FCA's willingness to engage with stakeholders and receive feedback on the original proposals. This consultation process has led to significant changes to the FCA's proposals as described in CP24/2, Part 2.

As previously noted, the Associations' members support the FCA's objectives set out in the FCA 3-year strategy 2022-2025 which aims to (i) reduce and prevent serious harm, (ii) protect the integrity of the UK financial system, and (iii) promote competition in the interest of consumers. The Associations welcome the FCA's efforts to identify opportunities to adapt the UK regulatory system to further strengthen the attractiveness of UK capital markets.

Due to the complex nature of UK financial markets and its stakeholders, it is essential that regulation and regulatory oversight are proportionate and fit for purpose in order to facilitate orderly market conditions.

Following input from industry stakeholders and Government during the CP24/2 consultation process, and upon review of the updated proposals set out in CP24/2, Part 2, Association members share the view that, while the FCA's proposals may be better suited to UK retail markets, the proposals are not fit for purpose within the UK's wholesale financial markets

The Associations' members encourage the FCA to reflect on the concerns set out in response to CP24/2, and within our response to this second consultation paper, and consider alternative methods already available to the FCA to improve transparency and achieve its desired outcome. We remain confident that the FCA's objectives can be achieved through existing means which allow for the FCA to publish timely information about investigations in a

[1] FIA is the leading global trade organization for the futures, options and centrally cleared derivatives markets, with offices in Brussels, London, Singapore and Washington, DC. Our membership includes clearing firms, exchanges, clearinghouses, trading firms and commodities specialists from about 50 countries as well as technology vendors, law firms and other professional service providers.

[2] The European Principal Traders Association (FIA EPTA) represents the leading Principal Trading Firms in the EU and UK. Our members are independent market makers and providers of liquidity and risk transfer for markets and end-investors across Europe, providing liquidity in all centrally cleared asset classes including shares, bonds, derivatives and ETFs. FIA EPTA works constructively with policymakers, regulators and other market stakeholders to ensure efficient, resilient and trusted financial markets in Europe. More information about FIA EPTA and independent market makers is available on: www.fia.org/epta and www.wearemarketmakers.com

robust and effective way in order to raise consumer awareness, protect consumers, maintain market confidence, educate the market and deter misconduct.

Our response includes comments on several elements of the FCA's proposals. These are addressed in the responses to the questions listed below.

Assessing what is in the public interest **<u>Staged decision-making process (see paras 4.1 – 4.10)</u>** ***If we were to take our proposals forward, we anticipate taking a decision in stages, focusing on what is reasonable and proportionate at each step.*** **1. Do you have any comments on the proposed staged decision-making process to announce investigations?**

FIA and FIA EPTA Response:

As set out above, Association members remain opposed to the FCA's proposals set out in CP24/2 and updated within CP24/2, Part 2.

The FCA acknowledges that it needs to, and has taken initial steps to, reduce the number of investigations and speed up the time taken to complete investigations. We previously argued that the reputational impact on a firm, as well as on individuals and senior managers within the firm, resulting from an announcement at the outset of an investigation, is difficult to justify when the average duration of an investigation is 41 months through to completion and approximately 65% of investigations close with no further action. We note that the average time taken to complete an investigation in 2023/24 was 42 months but the FCA highlights four investigations which took between 13-16 months to complete.

Furthermore, we note a reduction in the volume of investigations as the FCA recalibrates its focus at the triage stage to determine whether an investigation is likely to drive impactful deterrence and/or whether other tools can be used to stop and reduce harm, thereby removing the need for formal investigation. We acknowledge the reduction in the volume of investigations from 220 in April 2023 to 147 in November 2024.

By taking time to further adjust and streamline its internal management of investigations, including the pace and volume of investigations, Association members are convinced that the FCA can achieve its objectives of creating greater transparency, garnering an environment based on openness and accountability. Furthermore, this will allow the FCA to educate and inform the market in a timely manner while remaining open to scrutiny by consumers, firms and Parliament. Ensuring the FCA's internal processes work as they should means that the proposals set out in CP24/2, Part 2 become somewhat redundant.

While Association members appreciate that the FCA acknowledges the need to consider the impact of an announcement on those under investigation as well as the impact on the financial market, we share the view that the FCA has no robust method to pre-determine the impact of an announcement. We encourage the FCA to be mindful of the undesirable consequences resulting from information entering the public domain. The FCA experienced this firsthand in 2024 when CP24/2 was published. The media response and scrutiny caused the FCA to lose control of the narrative, thus detracting from the overall aims and objectives set out in the Consultation.

Without a robust and consistent framework to pre-judge the impact that an announcement may have, these proposals risk creating and heightening risk within UK financial markets.

The revised public interest assessment (see paras 4.1 – 4.10)

We have identified potentially relevant factors to consider when deciding if an announcement could be in the public interest.

2. Do you have any comments on the factors we have identified, or further factors we should consider?

FIA and FIA EPTA Response:

Within our response to CP24/2, the Associations highlighted that the existing FCA Enforcement Guide states that where the FCA is investigating a matter, the FCA will, *in exceptional circumstances*, make a public announcement that it is doing so if the FCA considers such an announcement is desirable to:

(1) maintain public confidence in the *financial system* or the market; or
(2) protect *consumers* or investors; or
(3) prevent widespread malpractice; or
(4) help the investigation itself, for example by bringing forward witnesses; or
(5) maintain the smooth operation of the market.

In deciding whether to make an announcement, 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.

As outlined above, the FCA has existing powers to make public announcements relating to investigations.

As stated in 6.1.4 of the Enforcement Guide, the FCA believes that *exceptional circumstances* may arise where matters under investigation have become the subject of public concern, speculation or rumour. In this scenario, and those referred to in paragraph 6.1.3, our members agree that it may be desirable for the FCA to make public certain facts in order to allay concern, contain speculation and rumour, while also maintaining confidence in the financial system and protect consumers. Beyond this, Association members share the view that there is limited justification for naming a firm at the outset of an investigation.

Balancing the desire for transparency with the smooth running of financial markets should be of the utmost importance. Association members recommend that the FCA consider implementing minor adjustments to 6.1.3 and 6.1.4 of the FCA Enforcement Guide to achieve its objectives rather than creating a complex framework which is likely to result in increased scrutiny of the FCA's management of investigations.

Giving firms time to respond (see paras 4.14 – 4.16)

We would generally share a copy of the proposed announcement and provide firms with at least 10 business days to make any representations to us. This may also give firms time to consider whether they want, or may be required, to make an announcement themselves. If, after considering the firm's representations, we still decide to publish an announcement, we would share our reasons and give firms a copy of the final text at least 2 business days before we publish it.

4. Do you have any comments on these proposals?

FIA and FIA EPTA Response:

While Association members fundamentally disagree with the FCA's proposals, we acknowledge and welcome that the FCA has taken onboard respondents' concerns, increasing the notice period from 1 business day to 10 business days.

Association members question the steps taken by the FCA to propose 10 business days. This appears to be an arbitrary figure and members would appreciate insight on how this has been determined.

As previously noted, prior to making a public disclosure, the Office of Financial Sanctions Implementation (OFSI) will grant 28 working days' notice in order to allow for the entity to make representations. Following representations and the expiration of the 28-day notice, which can be extended, should OFSI wish to make a public announcement, they will share the written case summary with the firm to ensure factual accuracy. OFSI sets a high bar to be satisfied before a disclosure will be made and this power will be used in genuinely exceptional cases

Association members share the view that aligning with OFSI in order to create consistency would be more appropriate, especially given that a firm will find it challenging to gather all relevant information and assess the most appropriate representations within 10 business days.

Safeguards (see para 4.17 – 4.19)

We have provided detail on our process when deciding whether to announce.

5. Do you have any comments on these proposals?

FIA and FIA EPTA Response:

Within 4.18, the FCA states that the proposed notice periods of 10 and 2 days would provide ample opportunity for a firm to raise a legal challenge if it wished to. How has the FCA come to this assessment? Gathering all relevant information to determine if a legal challenge should be raised can be a lengthy process and may require external counsel in some instances.

Safeguards set out within CP24/2, Part 2, should also account for steps taken by the FCA to ensure sensitive information is handled appropriately and that the necessary framework exists within the FCA to ensure that any proposals are complied with in a consistent manner.

We note the recent incident whereby the FCA mistakenly revealed information about plans to review an insurer. This oversight, where information enters the public domain erroneously, raises questions as the whether the FCA ought to abandon these proposals and work to prioritise the timing and volume of investigations as set out in our response to Q.1 above.

Case Study 2 – Citigroup Global Markets Limited (see para 5.13 – 5.20)

7. Do you have any comments on this case study?

FIA and FIA EPTA Response:

Association members argue that an announcement from the FCA may have been justified given that it satisfies two of the criteria set out in 6.1.3 of the existing FCA Enforcement Guide, most notably;

(1) maintain public confidence in the *financial system* or the market; and
(5) maintain the smooth operation of the market.

We are concerned that the FCA has created barriers for itself as a result of the FCA's own interpretation of the Enforcement Guide. As noted in our response to Q.2 above, the FCA ought to consider whether implementing minor adjustments to 6.1.3 and 6.1.4 of the FCA Enforcement Guide would achieve its objectives rather than creating a complex framework which is likely to result in further scrutiny of the FCA's management of investigations.

With respect to Case Study 2, while an announcement may have been justified, based on the existing FCA Enforcement Guide, Association members believe that an announcement from the FCA would be of little value, providing no educational or deterrence benefits, given that the flash crash had minor impact on the market and Citigroup Global Markets Limited almost immediately announced its trading error. A further announcement from the FCA would have been superfluous, offering no additional insight and likely creating confusion given that the announcement would be days following the incident based on the proposed notice periods set out in CP24/2, Part 2.

The notice outlined in 5.19 of CP24/2, Part 2 makes one question the benefit offered by these proposals. The proposed notice (below) offers no value beyond profiling the existence of an investigation. Any educational benefits from Case Study 2 could be published without naming the entity.

'The Financial Conduct Authority has begun an investigation into Citigroup Global Markets Limited in connection with its trading in European shares on 2 May 2022. We have not reached any conclusions as to whether regulatory requirements have been breached.'

Impact of proposals on firms (see paras 6.1 – 6.15)

We propose including impact as a factor in our public interest framework with a 10-day window for representations.

11. Do you have any comments, data or evidence on the potential impact of our proposals on firms?

FIA and FIA EPTA Response:

As outlined in our response to Q.1 above, while Association members appreciate that the FCA acknowledges the need to consider the impact of an announcement on those under investigation as well as the impact on the financial system or market, we share the view that the FCA has no robust method to pre-determine the impact of an announcement. We encourage the FCA to be mindful of the potential undesirable consequences resulting from information entering the public domain.