

REGULATORY INTELLIGENCE

ANALYSIS: UK FCA's plan to publicise enforcement cases is radical, risky, may not deliver far-reaching transparency

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The UK Financial Conduct Authority (FCA) plan to publicise when it opens an enforcement action against a firm is risky but may not deliver far-reaching transparency, lawyers and regulatory experts said. The proposals are controversial and radical, said Martyn Hopper, a partner at Linklaters in London.

"Firms place a lot of value on the confidentiality of investigation processes, given the concern that any regulated firm is going to have that if the investigation is announced it will do significant damage to their reputation and to their business before there has been any finding of any actual wrongdoing or compliance failure within their organisation," he said.

It is legally controversial because the FCA previously took the view that statutory confidentiality requirements in primary legislation places a professional secrecy regime on regulators, Hopper said.

"The consultation paper and the speech are unclear about how the FCA has satisfied itself that it can announce not just the fact that they're doing an investigation but also details of what that investigation is about without breaching that restriction," he said.

"On the case"

The FCA this week published a consultation paper (CP 24/2) setting out its approach to publicising when cases are opened and closed. Cases involving individuals will not be publicised. Firms will be given 24 hours' notice before a such announcement is made. The FCA will use a public interest assessment framework to determine which cases to publicise.

Publicising enforcement cases will allow the FCA to be more transparent about what it investigates, enhance public confidence, and show it is "on the case", said Therese Chambers, the FCA's joint executive director of enforcement and market oversight in a [speech](#) on Feb 27.

"We want to drive our own accountability by shining a light on the efficiency and pace of our investigations.# So, where it is in the public interest to do so, we propose to announce the opening of an investigation into a firm.# We will also be upfront about our progress and about when we have had to close a case," Chambers said.

After the speech, Chambers declined to give an example of when the regulator might have used this approach in a previous case.

"The application of our proposed new policy involves consideration of all the relevant facts and circumstances of the investigation in question. We do not think it appropriate to speculate which of our investigations we might have previously announced. We remain bound by our current policy until any changes are decided on. We are consulting on the changes. We do so openly and don't want to prejudice the result," a spokesperson for the FCA said.

Enforcement will take decisions on announcements with the involvement and advice from other internal stakeholders.

"We welcome increased transparency and bringing enforcement investigation disclosure into line with the Competition and Markets Authority's approach. We'll be interested to see how the new approach interacts with the confidentiality requirements of s348 of FSMA," said Ned Beale, a partner at Hausfeld in London.

FSMA section 348

Previously, the FCA declined making enforcement cases public, citing the Financial Services Markets Act (FMSA 2000) [section 348](#) restricts disclosure of confidential information. That view has now changed.

"FSMA does not impose any specific restriction on our publishing the fact that we are conducting an investigation," says the FCA's consultation on publicising enforcement investigations (CP 24/2). The consultation paper does not include any discussion of how the regulator determined it could announce investigations into firms. Early publicity will however have deterrent and educational effects, the paper says.

"It would have been much more helpful if the FCA could at least have provided a hypothetical example of what sort of information it's going to put into the public domain. Simply announcing that an investigation is going on in relation to a named firm is not going to give the transparency that the FCA is now heralding. If it is going into lots of detail about what the investigation is about, what the suspected breaches are, and what the circumstances of those suspicions are, that is going to involve revealing information that the FCA has



obtained about the affairs of the regulated firm. That is information which on the face of it is subject to the professional secrecy regime in the Act," Hopper said.

Some 90% of enforcement cases start with firms finding something wrong and reporting it to regulator. The FCA will need to be careful to give firms confidence the information they supply to the regulator remains confidential, said Gavin Stewart, a commentator and former regulator.

"I don't think the FCA has overall shown itself capable of being more transparent off its own bat, and it seems to be quite free with using the confidentiality obligations under s348 to avoid publishing information. Meanwhile, these enforcement proposals will make firms nervous about what might be in future press releases. Neither of these trends is good and we probably now need something that provides greater clarity about what sort of information the FCA should be publishing, while continuing to give firms absolute confidence in the confidentiality of the information they provide to the regulator," he said.

Transparency

The FCA's predecessor, the Financial Services Authority, looked at how it might be more transparent in 2008 and 2013 ([DP 13/1](#)).

"While section 348 limits the information that the FCA will be able to disclose, it does not prevent it from being a more transparent regulator. The FCA's policy will continue to be not to normally make public the fact that we are, or are not investigating any firm or individual. The investigation would remain private until the warning notice stage is reached," the 2013 paper said.

The paper proposed publishing information such as the amount of redress a firm paid and disclosing redress schemes' details. It considered increasing transparency around early interventions and its authorisation process. It also proposed "to develop a consistent approach for publishing the results of thematic work on an anonymised/aggregated basis".

"More than a decade ago, Section 348 was looked at in the context of FSMA 2012, but was left as it was in the belief that the FCA could be more transparent without altering the confidentiality requirements. I was involved in the subsequent work, and genuinely thought the FCA could become a lot more transparent without s348 changing. However, I'm not convinced that has happened," Stewart said.

Some of the 2013 suggestions have materialised over time. The FCA does publish data on authorisation performance, for example. It publishes a wide range of data on its [website](#) including enforcement data, which is updated [annually](#). There is no longer an annual enforcement report, however. It has no plans to increase the frequency or granularity of enforcement data published.

"Our proposals will enable us to be more transparent about our investigations, just as we are already transparent in publishing, in the public interest, a huge volume of information about matters such as how we operate and our processes, surveys, research, standards, detailed metrics and progress against those metrics," a spokesperson for the FCA said.

(Rachel Wolcott, Regulatory Intelligence)

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