

# CP24/2 Consultation Paper on Our Enforcement Guide and publicising enforcement investigations – a new approach

## ClientEarth consultation response

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### **A. About ClientEarth**

ClientEarth is an international non-profit environmental law organisation headquartered in London. Our Accountable Finance team focuses on the legal implications of climate change and other environmental issues for a wide spectrum of market participants, including banks, companies, investors, directors, professional advisers and regulators.

This document responds to the FCA's February 2024 [Consultation Paper](#) on its Enforcement Guide and publicising enforcement investigations.

We welcome further discussion with the FCA on any of the topics below. For any follow up questions, please contact Alex Bennett ([abennett@clientearth.org](mailto:abennett@clientearth.org)) or Megan Clay ([mclay@clientearth.org](mailto:mclay@clientearth.org)).

### **B. Introductory comments**

ClientEarth's interest in the FCA's approach to publicising enforcement activities stems from its work ensuring that laws, financial regulations and rules are effective and that financial institutions are held to account. ClientEarth has brought ten financial institutions to the attention of the FCA for climate-related

reporting failures since August 2018 (see Annex 1). We refer to these interventions in more detail below, but it is in this context that we welcome the proposed updating of the Enforcement Guide and strongly support the FCA's proposals to increase publication of its enforcement activity. We agree that enhanced publication measures will effectively drive the FCA's accountability and materially strengthen the educational and deterrent impact of its enforcement activities. We agree that the proposed changes to the Enforcement Guide support and build upon the FCA's overall presumption of transparency as a critical regulatory tool.

### **Alignment with other UK enforcement bodies**

The suggested alignment of approach with other UK enforcement bodies is helpful and constructive (para. 2.18). By way of example, we note the Advertising Standards Authority's ("ASA") recent findings on greenwashing in HSBC UK Bank plc's advertising and the Competition and Markets Authority's ("CMA") publication of the nature and outcome of its investigation into complaints about the fashion industry. These regulators' communications are clear and comprehensive and provide a strong signal to the market about compliant and non-compliant behaviours.

The CMA published details of the activities under investigation, its precise concerns about those activities, and the outcome with actions taken and to be taken by ASOS, Boohoo and Asda.<sup>1</sup> This level of detail and timely publication puts businesses and consumers on notice of potentially infringing behaviours and provides constructive tools with which to both prevent and curtail endemic infringing market behaviours. Consistency of approach with the CMA in particular will counter any public and stakeholder perception of an enforcement gap in relation to the overlap of FCA's enforcement powers with those of the CMA in relation to unfairness in commercial practices and consumer protection.<sup>2</sup>

The ASA also publicises details of its investigations and outcomes with forceful effect. These communications form a useful precedent for the level of detail to be included in announcements, updates and outcome notifications. In the HSBC case, the ASA publicised (a) full details of the advertisements under investigation; (b) the nature of the complaints being raised; (c) the response from HSBC; and (d) a detailed summary of the ASA's assessment of the claim, its conclusions and its reasons for upholding the complaint.<sup>3</sup> This level of information provides a clear steer to the public and to business about how ASA rules are applied and the seriousness with which the ASA treats complaints.

We also highlight the disparity between publicly available information about legal claims brought against financial institutions or individuals in the UK courts and the current presumption of confidentiality around enforcement activity taken by the FCA against the same type of actors. Early publication of investigatory activity and the naming of investigation subjects would serve to settle this disparity as well as bringing the FCA into line with other UK enforcement bodies.

### **Transparency and transformation: enforcement activity (Consultation Paper, para 2.6)**

We welcome and support the FCA's argument that increased publicity will make the pace and efficiency of its enforcement actions more visible; we also welcome a focus on strong and ambitious enforcement.<sup>4</sup> However, whilst we support the principle of streamlining case management to free up resource for the most impactful cases and those which clarify important points of regulation, we note that increased

<sup>1</sup> CMA ASOS, Boohoo and Asda: greenwashing investigation, last updated 27 March 2024.

<sup>2</sup> Under the Consumer Protection from Unfair Trading Regulations 2008 (SE 2008/1277) and Part 8, Enterprise Act 2002.

<sup>3</sup> ASA Ruling on HSBC UK Bank plc.

<sup>4</sup> Foreword; para 2.13.

publicity which leads to less enforcement in key areas of regulation would be a poor outcome for consumers and for the market.

Enhanced publicity should not necessarily impact the number of investigations being undertaken, just their visibility. We would not want the FCA to suggest that early publication of investigation may, in some way, reduce the realistic prospect of enforcement activity or replace more vigorous enforcement activity; enforcement action must be a realistic prospect as well as the prospect of enforcement being publicised.

To take greenwashing as an example: the current level of visible enforcement of greenwashing and breaches of sustainability-related regulation is, we suggest, inadequate to address serious, widespread malpractice in regulated financial services. IOSCO recently articulated the need for swift and robust enforcement action by supervisors in relation to greenwashing breaches, stating that ‘supervisors should [...] play a key role [...] by overseeing compliance with sustainability-related regulations, including promptly referring breaches for enforcement actions and potential sanctions’.<sup>5</sup> In its report, IOSCO summarised the supervisory and enforcement tools and measures used by securities regulators to enforce against greenwashing: there are multiple examples of regulators around the world taking (and reporting) decisive enforcement action in relation to greenwashing. These include:

- In response to a greenwashing claim brought by ASIC, the Australian Federal Court found that Vanguard Investment Australia made false or misleading claims in a Vanguard index fund;<sup>6</sup>
- Other enforcement actions reported by ASIC in relation to greenwashing by investment funds, including a greenwashing case launched against Active Super in August 2023;<sup>7</sup>
- Sanctions imposed by the SEC against Goldman Sachs, BNY Mellon and DWS;<sup>8</sup>
- Investigatory action against DWS by BaFin;<sup>9</sup>
- The UK ASA’s judgement that HSBC’s advertising in relation to climate finance was misleading;<sup>10</sup> and
- The UK’s CMA’s investigatory action into environmental claims made about fashion products by ASOS, Boohoo and Asda, resulting in undertakings being provided by each firm committing to rules around the use of green claims.<sup>11</sup>

In contrast with the activities of these other regulators, the FCA does not appear to have taken any enforcement action against regulated firms where there is evidence of greenwashing.<sup>12</sup> Since August 2018, ClientEarth has drawn ten companies to the attention of the FCA for climate-related reporting

<sup>5</sup> [FR12/23 Supervisory Practices to Address Greenwashing \(iosco.org\)](#), December 2023, p. 9.

<sup>6</sup> [ASIC wins first greenwashing civil penalty action against Vanguard](#).

<sup>7</sup> See [Report REP 763 ASIC’s recent greenwashing interventions, May 2023](#); [23-215MR ASIC commences greenwashing case against Active Super | ASIC, 11 August 2023](#).

<sup>8</sup> [SEC.gov | SEC Charges Goldman Sachs Asset Management for Failing to Follow its Policies and Procedures Involving ESG Investments, 22 November 2023](#); [SEC.gov | SEC Charges BNY Mellon Investment Adviser for Misstatements and Omissions Concerning ESG Considerations, 23 May 2023](#); [SEC.gov | Deutsche Bank Subsidiary DWS to Pay \\$25 Million for Anti-Money Laundering Violations and Misstatements Regarding ESG Investments, 25 September 2023](#).

<sup>9</sup> [DWS shares slide after greenwashing claims prompt BaFin investigation](#).

<sup>10</sup> [HSBC UK Bank plc - ASA | CAP](#).

<sup>11</sup> [ASOS, Boohoo and Asda: greenwashing investigation](#).

<sup>12</sup> This is our understanding based on publicly available information. See, for example, the following sources: [Data on investigations into greenwashing & ESG mis-selling - July 2022 | FCA](#); [UK’s FCA has met with asset managers on ESG but is yet to conduct greenwashing investigations \(responsible-investor.com\)](#); [Information on sanctions and investigations on climate-related disclosures - June 2022 | FCA](#); [Information on firms sanctioned for greenwashing - April 2022 | FCA](#).

failures (see Annex 1); ClientEarth is not aware of any regulatory engagement by the FCA as a result of these referrals. This enforcement gap, or the perception of an enforcement gap, would be addressed by the proposed enhanced publicity measures. However, publicity changes should not be used to mitigate the effect of lowered or lowering enforcement activity, particularly in relation to prevalent market practices such as greenwashing and which the FCA has signalled as a ‘priority for us’.<sup>13</sup>

Robust enforcement action sends a clear signal that infringing behaviours will not be tolerated by the regulator; reporting details of this investigatory and enforcement activity in the manner envisaged by the Consultation Paper maximises educational impact, consumer trust in the markets, and deterrent effects and counters any perception of an enforcement gap. Absent robust enforcement (and to continue with our greenwashing example) the incentive not to invent or inflate sustainability claims is weak, and the few firms acting in bad faith can obtain competitive advantage over those making genuine claims.<sup>14</sup> Clearly this is not in the best interests of consumers. Public reporting of the initiation of investigations, their progress, and their outcomes will send a clear signal to the market that the FCA will not tolerate false or misleading claims and provide invaluable guidance on what poor practice looks like. This analogy can, of course, be extended to other forms and areas of breaching behaviours.

### **Environmental, social and governance considerations (paras. 2.25 & 2.26)**

We disagree that these proposals are not relevant to FCA’s contribution to the Secretary of State achieving compliance with the net-zero emissions target under section 1 of the Climate Change Act 2008 (“**CCA 2008**”) and environmental targets under section 5 of the Environment Act 2021 (“**EA 2021**”).

Decisive, authoritative and transparent enforcement measures support the UK Government’s efforts to meet its climate commitments by countering misdirection of finance into industries, investments and participants whose activities are incompatible with the net-zero emissions target under CCA 2008. The UK Government’s 2023 *Green Finance Strategy* notes the FCA’s remit to ‘[embed] sustainability considerations across all of [its] regulatory functions’.<sup>15</sup> A stronger enforcement and transparency approach supports the FCA in meeting this remit alongside delivering its strategic and operational objectives.

An example could be the use of robust and visible enforcement of rules aimed at countering the misdirection of finance into products which exaggerate, mislead or misrepresent sustainability-related claims.<sup>16</sup> Addressing greenwashing in financial products and services can improve consumer confidence and trust and enhance the transparency, credibility and integrity of markets as well as redirecting capital into investment products that drive positive environmental change.<sup>17</sup> As the FCA has acknowledged: ‘If stakeholders trust the sustainability-related claims firms are making about their products and services, this may increase confidence in markets and the flow of capital into these

<sup>13</sup> [FG24/3](#) Finalised non-handbook guidance on the Anti-Greenwashing Rule, para. 1.3.

<sup>14</sup> For example, greenwashing enables these firms to take advantage of the marketing benefits associated with a claim while avoiding the costs of delivering against the claim.

<sup>15</sup> HM Government, [Mobilising Green Investment: 2023 Green Finance Strategy](#), March 2023, p.59.

<sup>16</sup> IOSCO recognises that ‘greenwashing remains a fundamental market conduct concern that poses risks to both investor protection and market integrity’, [FR12/23](#) Supervisory Practices to Address Greenwashing (iosco.org), December 2023, p. 4.

<sup>17</sup> Greenwashing effects occur through e.g. mis-labelling or greenwashing of financial products and other impacts emerging from financial service providers’ false or exaggerated net zero commitments or unsustainable transition plans and concerns around transition finance (see [Transition Finance Market Review: terms of reference](#) ([www.gov.uk](http://www.gov.uk)), 18 December 2023), sustainability-linked bonds and impact-washing (FCA acknowledges issues with impact washing in its ‘[Dear Chair](#)’ letter to authorised fund managers, 19 July 2021, p. 2).

products'.<sup>18</sup> Helping to ensure that sustainability claims stand up to scrutiny and consumers are protected from misleading or inaccurate sustainability-related claims advances the FCA's operational objectives, including through robust enforcement and being seen to enforce rigorously and consistently. Sidelining the relevance of environmental and climate targets in enforcement proposals wrongly suggests that the FCA's duty to contribute to the UK Government's statutory obligation to comply with net-zero emissions targets is peripheral to its enforcement activities. The *Green Finance Strategy* describes the correlation between effective operation of financial markets and UK's climate and environmental goals and the importance in this configuration of consumer protection: 'Mobilising private capital into the sectors and technologies needed to deliver net zero and our wider environmental targets requires market participants to have the right information and tools to assess opportunities and risks effectively. Stakeholders have been clear there is a role for the UK government to facilitate financial markets to deliver this, as well as to ensure green finance markets are robust and that protections against greenwashing are in place for consumers'.<sup>19</sup>

We suggest, therefore, that the FCA's finalised policy recognises the relevance of ESG considerations and greenwashing to its enforcement activities as facilitating compliance with the UK Government's obligations to meet net-zero emissions targets under CCA 2008, environmental targets under EA 2021 and its 'aim [...] for UK financial firms' activities to be consistent with the pathway toward our domestic and global net zero objectives'.<sup>20</sup>

## C. Consultation questions responses

**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.**

We strongly agree with the proposals to announce investigations, including names of subjects, and publish updates when it is in the public interest to do so. We also agree with the FCA's arguments in support of these changes as underpinned by principles of transparency, education and deterrence. Early announcement of investigations will encourage potential witnesses to come forward, supporting investigatory evidence-gathering from the outset of an investigation.

Provided comprehensive detail is included of the nature of the investigation, the facts under investigation and the FCA's findings and reasons for those findings, we consider that announcing investigations and publicising updates and outcomes in particular will be instructive, educational and constructive in raising standards and building trust in the FCA and UK financial markets.

We have the following specific comments:

### *Announcements of investigations and updates*

We consider the early publication of investigatory activities, with regular updates to reassure the public of progress, to be of primary importance to the delivery of the FCA's objectives of protecting consumer interests and preserving the integrity of the UK financial system.

<sup>18</sup> [FG24/3 Finalised non-handbook guidance on the Anti-Greenwashing Rule](#), para. 1.3.

<sup>19</sup> HM Government, [Mobilising Green Investment: 2023 Green Finance Strategy](#), March 2023, Executive Summary, para. 8.

<sup>20</sup> [Mobilising Green Investment: 2023 Green Finance Strategy](#), March 2023, Chapter 2, para. 3.

More visible enforcement measures will significantly increase regulatory transparency and materially contribute to building trust. We have already referred to ClientEarth's experience of raising complaints with the FCA from which, so far as we are aware, no enforcement action has resulted. We also refer to the FCA's own findings that 'whistleblowers' confidence is undermined by a perceived lack of feedback from the FCA as to whether their concerns are being investigated'.<sup>21</sup> To the extent that the FCA is able to share details without breaching confidentiality restrictions, it is crucial for stakeholders identifying breaches of rules to understand what has happened to their complaint. Announcing investigations will reduce confusion and substantially increase clarity and transparency about how complaints are treated, bolstering consumer and market participant confidence and trust in the FCA's authority. Early publication of investigatory activities and updates of progress provides reassurance and builds confidence, not only in the FCA's enforcement processes but that enforcement is taking place at all.

Furthermore, publication of investigations at an early stage maximises enforcement and deterrent impacts, not least in bringing about wider curtailment or prevention of the same or similar misconduct practices. This is particularly important given the often considerable length of time it takes for investigations to progress to completion: timely enforcement is critical to achieving a forceful deterrent impact.<sup>22</sup> Visibility of enforcement activity enhances the deterrent effect, increasing the impact of early enforcement activity and building trust in the regulator as a responsive and active enforcer. We agree with the FCA's view that information provided only on actual outcomes – on the conclusion of an investigation – results in 'significantly reduced' 'reassurance, educational value, and effectiveness' (para 2.12).

Early publication can also accelerate wider market responses to systemic concerns or where urgent action is required to deal with emerging issues in the market: we note the FCA's recent acknowledgement that earlier publication of investigations into breaches of anti-money laundering controls in 2021, 2022 and 2023 would have resulted in other firms acting 'more quickly to resolve similar issues before they worsened'.<sup>23</sup> We strongly agree that early publicity will 'enable [the FCA] to more effectively address risks to consumer and investors in increasingly fast-moving and emerging markets' (para. 2.20) as a robust mitigant to the dampening effect of the lapse of time. This requirement for fleet-footedness is particularly significant to the transition to a sustainable economy and the flow of capital into products that are aligned with that transition. Recent analysis suggests that the pace of climate change and its impacts on financial markets is drastically underestimated such that a wealth-damaging correction is 'virtually inevitable'.<sup>24</sup> Regulatory enforcement action and early publication of investigatory activities have a unique power to capture the financial markets' immediate attention and are required as a matter of urgency.

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<sup>21</sup> [FCA letter](#) to the House of Lords Financial Services Regulation Committee, 25 April 2024, p. 4.

<sup>22</sup> In the [FCA letter](#) to the House of Lords Financial Services Regulation Committee, 25 April 2024, the FCA notes that the average (mean) time to case closure for FCA enforcement action is 57 months (p. 11). ClientEarth called on the FCA in August 2021 to 'use its remit to hold laggards accountable... via robust, consistent, and timely enforcement action' ([Climate change and corporate reporting: the role of the FCA](#), ClientEarth, 18 August 2021).

<sup>23</sup> [FCA letter](#) to the House of Lords Financial Services Regulation Committee, 25 April 2024, p. 3.

<sup>24</sup> Professor Steve Keen, '[Loading the Dice Against Pension Funds](#)', July 2023. This report contrasts existing scientific models and economic models, identifying a 'huge' disparity between what scientists expect from global warming and what pension funds and financial systems are prepared for. The Institute and Faculty of Actuaries and the University of Exeter suggests that pension schemes' climate scenario models underestimate the rate and impacts of climate change, and therefore climate-related financial risk, and that, 'the modelled results for a hot-house world are overly benign' (Institute and Faculty of Actuaries, '[The Emperor's New Climate Scenarios](#)', at p.20, Section I: Emissions).

### *Naming subjects*

We agree with the FCA's proposals to name investigation subjects. In supporting the FCA's proposals to publish the name of investigation subjects, we consider that its aims of building trust, raising standards, education, and deterrence outweigh concerns about reputational risk.

Subject always to the overriding principles of confidentiality and the legal considerations in relation to the naming of individuals identified by the FCA, naming investigation subjects is a useful deterrent and supports the FCA's remit to maintain standards and reduce and prevent serious harm, including as a robust enforcer. Even where investigations do not lead to a public regulatory outcome, firms and the industry as a whole will benefit from greater clarity and understanding of the types of misconduct and failings that are a priority to the FCA and which outweigh concerns about individual firm reputations.

We also agree that naming investigation subjects will encourage whistleblowing and the participation of witnesses in the evidence-gathering process (para. 3.5). We suggest that, without the name of a subject being made public, the likelihood of whistleblowers or other witnesses coming forward is low. Revision of the approach toward naming subjects on the opening of an investigation will significantly enhance the likelihood of evidence being produced at an early stage of investigation, supporting the FCA's overarching aim for 'timely and impactful enforcement outcomes'.<sup>25</sup>

Whilst the change in approach may initially cause alarm, in our view consistency of publication approach will, in time, come to be seen as a part and parcel of FCA's activities, equipping firms with additional tools and information which will assist them in ensuring compliance with rules and regulations, rather than as purely a 'name and shame' mechanism. Publication of the investigation of a potential breach is not the same as ascribing guilt, nor is publicising the existence of a fact pattern that is cause for investigation equivalent to publishing a final notice regarding a proven breach. The FCA acknowledges this distinction at para. 3.9 and we support the proposed inclusion of a statement which makes it clear that the opening of an investigation does not imply any conclusion as to breach of regulatory or legal provision or other finding of misconduct or other failing as set out in proposed EG 4.1.6(1)(d).

In the event that the FCA uses its discretion not to publish the name of an individual subject, our strong view is that this decision should not impact proposals to announce investigations and publish updates on those investigations. Even where the subject is anonymised, publication of the fact (and facts) of the investigation should go ahead. Naming is, in our view, a separate question from early publication and the provision of updates.

**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.**

We support the FCA's proposal for a principles-based test and, broadly, we agree with the proposed structure and content of the framework. We have some suggestions for additional detail or limbs to be included:

### *Consumer protection*

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<sup>25</sup> [FCA letter](#) to the House of Lords Financial Services Regulation Committee, 25 April 2024, p. 3.

We suggest that this limb is expanded to clarify that the public interest is served where significant and/or new regulatory obligations require testing or clarification for the benefit of consumers and financial market participants. This might include, for example, providing ‘test’ cases in relation to new, ‘cornerstone’ rules or regulations which represent a ‘major shift in financial services’, such as the Consumer Duty or the ‘priority’ of ‘tackling greenwashing’.<sup>26</sup> There is, we suggest, a public interest in the FCA being seen to act on these new or flagship regulations and responding to its regulatory priorities. The FCA will act in the public interest by bringing enforcement action which illustrates practically where boundaries fall in relation to new legislation and sets expectations in ‘grey’ areas of regulation or for those which are open to varied interpretations.

#### *Addressing public concern*

We suggest that this limb is expanded to include addressing distinctive consumer concerns and priorities using climate change and sustainable investment preferences as examples. In 2021, the FCA found that 80% of respondents want their money to ‘do some good’, 71% want to ‘invest in a way that is protecting the environment’ and 71% would not put their money into ‘investments which are unethical’.<sup>27</sup> In 2023, FCA found that ‘74% of adults surveyed agreed that environmental issues are really important to them’ noting that ‘demand for sustainable products and services continues to grow’.<sup>28</sup>

#### *Stability of the UK financial system*

We suggest a further limb includes the public interest in addressing/ signalling widespread or systemic failures in the market, furthering the FCA’s objective of bringing about stability to the UK financial system. An illustrative and urgent example is climate change risk as a systemic and material financial risk to the integrity of the markets.<sup>29</sup>

It is widely accepted that climate change presents financial risks both for individual investors and for the financial system as a whole.<sup>30</sup> The wider physical, transition and systemic impacts of climate change also create risks to the broader interests of individuals. The world has already reached 1.1°C of warming and climate change impacts (and associated financial risks) are crystallising as weather and climate extremes create widespread adverse impacts and related loss and damage.<sup>31</sup> Impacts on the worst affected areas are expected to have a ripple effect across geographies and economies, from supply chain impacts to mass migration. There is a strong impetus on investors, regulators and governments

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<sup>26</sup> The FCA states that ‘The Consumer Duty is a cornerstone of our three-year strategy, a key element of our work to set and test higher standards between now and 2025. It is being prioritised at every level of the FCA, from the Board down, and it will drive our supervision strategies and prioritisation’ (Dear CEO letter from the FCA to asset managers dated 3 February 2023) and that ‘the Consumer Duty will lead to a major shift in financial services and will promote competition and growth based on high standards’ (Press release: ‘The FCA’s Consumer Duty will lead to a major shift in financial services, 27 July 2022); the FCA also states that ‘Tackling greenwashing is a priority for us’ (FG24/3 Finalised non-handbook guidance on the Anti-Greenwashing Rule, para. 1.3).

<sup>27</sup> See: <https://www.fca.org.uk/news/press-releases/fca-acts-help-investors-make-more-informed-esg-investment-decisions>. (November 2021).

<sup>28</sup> FG24/3 Finalised non-handbook guidance on the Anti-Greenwashing Rule, para. 1.3.

<sup>29</sup> The Institute for Energy Economics and Financial Analysis has reported a ‘financial time bomb’ in the form of growing and accumulating climate risks which are not accounted for in current credit ratings and, ‘will likely lead to rating volatility and instability, a costly affair for investors and issuers’ (Hazel Ilango, Institute for Energy Economics and Financial Analysis, ‘Rating stability at risk from looming climate downgrades’, 21 August 2023).

<sup>30</sup> See The Department for Work and Pensions, ‘Governance and Reporting of Climate Change Risk: guidance for trustees of occupational schemes’, June 2021; Bank of England, ‘Climate change’, as updated 22 November 2023; and The Network for Greening the Financial System, ‘NGFS Scenarios for central banks and supervisors’, September 2022.

<sup>31</sup> Widespread and rapid changes are occurring in the atmosphere, ocean and ice caps, while weather and climate extremes in every region across the globe are leading to extensive adverse impacts and related losses and damages to nature and people, as reported in IPCC AR6 Synthesis Report 2023.



to act in order to protect value and preserve the integrity of the financial system and as well as, more widely, the impetus to act in the public interest of protecting individuals and the planet against the impacts of climate change.<sup>32</sup>

#### *Impact on the investigated subject*

We agree that the impact on the named firm should not be a consideration for the public interest test; naming has a powerful deterrent function and holds firms to account. In particular, prioritisation of the FCA's consumer protection objective should not be overridden by concerns about investigation subjects. The FCA's proposals around providing adequate disclaimers and prompt publication where an investigation establishes no adverse findings, in our view, adequately protect firms from long-term or critical impacts.

We note the FCA's recent suggestion in its letter to the House of Lords Financial Services Regulation Committee that it will be 'mindful of the potential impact on small firms' and that it will 'consider all relevant factors when weighing up whether or how an investigation interacts with the public interest test'.<sup>33</sup> It is unclear what the FCA is referring to by 'relevant factors' and we suggest that any reference to 'relevant factors' in the finalised guidance is explained clearly to avoid confusion or lack of clarity as to what these factors comprise. It is our strong view that other 'relevant factors' – including any allusion to reputational risk – should be clearly articulated as secondary to the consumer protection objective.

#### **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.**

No response

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

We broadly support the proposed content in the announcements. The level of detail published is critical to the effectiveness of announcements and updates and we therefore make suggestions for maximising the impact of announcements, updates and outcomes:

#### *Level of detail*

Further clarity on the level of detail would be useful. In addition to the content proposed by the FCA, we suggest provision of the following details as appropriate for inclusion:

- the factual context as well as a summary of the suspected breach or issue, failing or other misconduct under investigation;

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<sup>32</sup> In relation to the impact of climate change on human rights, the Government has adopted the UN's Guiding Principles and committed to ensure that its policies enable business respect for human rights ('[Good Business: Implementing the UN Guiding Principles on Business and Human Rights](#)', HM Government, Updated May 2016). The UN has stated that 'States and business enterprises have obligations and responsibilities with respect to climate change, and with respect to the impacts of climate change on human rights' ('[Information Note on Climate Change and the Guiding Principles on Business and Human Rights](#)', by the Working Group on the issue of human rights and transnational corporations and other business enterprises, United Nations Human Rights Special Procedures, June 2023, para. 5). The UN also states that '[climate change] impacts directly and indirectly affect all human rights, including the rights to life, food, health and water. The impacts of climate change also exacerbate social and economic inequalities, disproportionately affecting people already in vulnerable situations' ('Information Note', para 1).

<sup>33</sup> [FCA letter](#) to the House of Lords Financial Services Regulation Committee, 25 April 2024, p. 7.

- where a complaint is upheld, the FCA's assessment and a summary of arguments made in response to the complaint; and
- action taken/ to be taken as a consequence of the FCA's assessment.

These additional details support the FCA's aim of education and deterrence and will provide financial services providers with the information needed to guide their own practices. We consider the ASA publication on the HSBC greenwashing case to include a good amount of detail by way of example.<sup>34</sup>

### *Timeframes*

We suggest that the information published also includes proposed timeframes for investigations and/ or updates. Timeframes will provide clarity to consumers and firms alike on how investigations will progress and set expectations for that progression, increasing perceptions of FCA accountability and further building trust.

### *Nature of firm*

As set out above, we support the FCA's proposals to publicise the names of investigated subjects as a tool for deterrence. If the name of the firm involved is to be withheld because, for example, the public interest does not necessarily require a firm under investigation to be named, or for other reasons, an explanation of the nature of the firm based on sector, size and form of misconduct should be provided; again, this information will assist financial services providers in using the information provided to inform their own conduct and activities even where a name is not provided.

### *Outcomes reporting*

Finally, in the event that the FCA's proposals on early announcement of the opening of investigations are diluted through the consultation process, it remains imperative that comprehensive, detailed and clear information on outcomes, with reasons, are published.

The level of detail provided, for example, in ASIC enforcement communications supports market understanding of pervasive or potential misconduct even when announcements are made at outcome stage. We refer by way of example to the recent ASIC enforcement action against Vanguard and the provision of information by ASIC on commencement of proceedings and the outcome of these proceedings, which are comprehensive and detailed.<sup>35</sup> We note that the FCA currently provides a substantial amount of detail in its Final Notices; however, we reiterate that this level of detail is published at too late a stage to act as an effective educational tool or early deterrent. For example, in the FCA's 11 October 2023 Final Notice issued to London Capital & Finance plc (in administration), the Notice was published five years after the misconduct took place.<sup>36</sup>

## **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.**

No response.

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<sup>34</sup> It includes: (a) full details of the advertisements under investigation; (b) the nature of the complaints being raised; (c) the response from HSBC UK Bank plc; and (d) a detailed summary of the ASA's assessment of the claim, its conclusions and its reasons for upholding the complaint ([ASA Ruling on HSBC UK Bank plc](#)).

<sup>35</sup> [Media Release](#): ASIC commences greenwashing case against Vanguard Investments Australia; [Media Release](#): ASIC wins first greenwashing civil penalty action against Vanguard.

<sup>36</sup> See, for example: [Final Notice 2023: London Capital & Finance plc \(in administration\) \(fca.org.uk\)](#).

**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.**

We agree with the proposed approach to publicising investigation updates, outcomes and closures subject to an additional suggestion below. We reiterate the importance of including comprehensive details of the assessments made and reasons for the steps taken, progress to the next stage and outcomes and/ or closure in these updates, outcomes and closure notifications.

Where information is not made publicly available for public interest (or other) reasons, we suggest a mechanism is incorporated into the Enforcement Guide to enable a complainant to request, and be provided with, an update on what, if any, steps will be taken in relation to a submitted complaint, as well as updates on progress. These updates may be provided on a confidential basis. We refer back to pages 3-4 in relation to ClientEarth's experiences of lack of transparency on what action, if any, has been taken in response to complaints made by ClientEarth to the FCA about financial institutions misconduct. This lack of transparency cuts across the principles set out in the Consultation Paper. In order to maintain and build trust in the regulator, we suggest that a mechanism is made available to complainants to understand what, if any, action has been taken in relation to a complaint, even where more details are not available for public interest or other reasons.

**Question 7: Do you agree with our proposal that moving our strategic policy information to the website will make information more accessible? Please give reasons if you do not agree.**

We agree that this move will make information more accessible and any improvement in transparency is welcomed. We would ask that the website makes enforcement decisions/ activities easier to find and/ search for, for example, by rule or rules impacted or nature of breach.

**Questions 8 – 11 inclusive**

We are not proposing to respond to these questions on the detail of the Enforcement Guide.

**Annex 1**

**ClientEarth notifications to FCA of climate-related reporting failures**

<b>Company</b>	<b>Date</b>
Phoenix Group Holdings <sup>37</sup>	2 August 2018
Lancashire Holdings Limited <sup>38</sup>	2 August 2018
Admiral Group plc <sup>39</sup>	2 August 2018
Centamin plc, Synthomer plc, and Bodycote plc (in a letter highlighting the role of the FCA in regulating and enforcing against climate reporting laggards, we used these companies as specific examples) <sup>40</sup>	18 August 2021
Just Eat Takeaway.com N.V. <sup>41</sup>	18 August 2021
Carnival plc and Carnival Corporation <sup>42</sup>	18 August 2021
Glencore plc (in a letter amplifying the referral made by EDO to Australian regulators, due to Glencore plc being LSE-listed, encouraging the FCA to investigate, and highlighting the FCA's obligations to coordinate internationally with other regulators)	8 September 2022

<sup>37</sup> [FCA Complaint – Phoenix Group Holdings/ ClientEarth](#) (2 August 2018).

<sup>38</sup> [FCA Complaint – Lancashire Holdings Ltd/ ClientEarth](#) (2 August 2018).

<sup>39</sup> [FCA Complaint – Admiral Group plc/ ClientEarth](#) (2 August 2018).

<sup>40</sup> [Climate change and corporate reporting: the role of the FCA | ClientEarth](#) (18 August 2021).

<sup>41</sup> [Just Eat Takeaway.com N.V FCA referral request/ ClientEarth](#) (18 August 2021).

<sup>42</sup> [Carnival plc and Carnival Corporation FCA Referral Request/ ClientEarth](#) (18 August 2021).