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

Submitted by email: cp24-2@fca.org.uk

Re: Consultation Paper CP24/2: *Our Enforcement Guide and publicising enforcement investigations - a new approach***

Dear Sir or Madam,

The Standards Board for Alternative Investments ("SBAI") welcomes the opportunity to respond to the Financial Conduct Authority's ("FCA") Consultation Paper CP24/2** on *Our Enforcement Guide and publicising enforcement investigations - a new approach* ("CP").[1]

At the SBAI, we are an active alliance of managers and investors dedicated to advancing responsible practices, partnership, and knowledge in the alternatives industry. At our core is a community that is committed to knowledge sharing, informed dialogue, and innovation. We set clear standards and actively promote responsible practice to normalise quality and fairness. Together, our community of allocators and managers create real world solutions – in short, we solve for better.

The SBAI Alternative Investment Standards[2] are supported globally by over 150 alternative investment managers representing more than US$2 trillion in alternative assets under management, and by over 100 institutional investors, overseeing more than US$6 trillion in assets.

While the FCA's proposals to enhance transparency and expedite enforcement actions are aimed at improving the effectiveness of market oversight and improving industry conduct, there are potential unintended consequences of the proposals in relation to alternative investment fund managers and the broader financial industry which warrant careful consideration.

The SBAI will outline below our thoughts on how existing industry practices could be improved / enhanced to achieve the desired outcomes, whilst highlighting our concerns in relation to the publication of early details related to ongoing enforcement cases (CP Questions 1 to 6).

[1] FCA CP24/2 accessible here: *https*://www.fca.org.uk/publication/consultation/cp24-2.pdf
[2] The Alternative Investment Standards ("Standards") address key areas of alternative investment practice including disclosure, valuation, risk management, fund governance, and shareholder conduct. Access here: https://www.sbai.org/standards.html

1. Specific Observations

While we welcome some aspects suggested in the CP (e.g., additional clarity around the types of misconduct the FCA believes warrant a formal investigation and the proposed simplification of the Enforcement Guide), there are some concerns which have been raised both on a technical and fundamental level which we seek to add to the ongoing debate on the proposed regulation.

1.1 Unintended Consequences

Publicly announcing investigations before their conclusion could lead to significant reputational harm for entities involved, regardless of whether any announcement caveats that they do not imply a conclusion has been reached. For investment managers, even a hint of regulatory scrutiny can cause a swift negative reaction from the market which can affect investor confidence and business relationships irreversibly.

The stigma attached to being under investigation can lead to unwarranted conclusions by the market and the public. This speculative damage could be both misrepresentative to the ultimate outcome / findings of the investigation, as well as disproportionate to the concerns raised – potentially causing more harm than the enforcement aims to prevent. Allocators in the alternative investment sector are especially sensitive to reputational issues affecting the investment managers they do business with and are thus more likely to reduce or cease doing business with managers who attract media attention for a regulatory inquiry. As a result, the FCA's proposed "naming and shaming" efforts may have a disproportionate impact on the alternative investment sector.

There is a genuine concern that public announcements of regulatory investigations could trigger increased redemption activity which could adversely impact the financial viability of investment managers and result in material financial losses for their clients/investors. It is difficult to justify inflicting this economic harm on parties who have not yet been shown to have engaged in misconduct (let alone on their clients).

Moreover, for investment managers, dealing with the fallout of a public investigation announcement can divert essential resources and focus away from core business operations which could further negatively impact investors. The work environment could become strained and stressful, impacting employee performance and retention. Furthermore, the 24-hour prior notice period leaves investment managers little time to adequately prepare for increases in investor questions and queries.

Even after the conclusion of an investigation where no wrongdoing has been shown, investment managers will for an extended period in the future be required to communicate details of such an investigation and its outcomes to prospective investors through the initial due diligence process, therefore creating a lasting reputational and administrative burden.

1.2 Subjectiveness of the Public Interest Framework

We note that the application of the public interest framework in assessing whether to publicly announce an ongoing investigation could lead to inconsistency in how similar examples are treated. In other words, the application of the framework in assessing whether public announcements have merit would appear to be driven by subjective rather than objective criteria, which unclear thresholds of what constitutes "public interest". Given the very real threat of adverse impacts to firms by public announcements, we believe the FCA should give additional consideration to formulating defined criteria or behaviours of a sufficiently material nature that would need to occur to warrant such action being taken. For example, enforcement notifications disclosed by

the Monetary Authority of Singapore (MAS) (which the CP notes as having a similar approach) have only related to cases of misconduct which have been sufficiently material to warrant involvement with the local police.[3]

A potentially more equitable proposal may allow for first time offenders to not be named publicly, so long as their potential infringement is deemed to be immaterial. Repeat offenders, however, may lose such protections.

1.3 Constructive Engagement

A range of tools are already exercised by the FCA in communicating their concerns publicly including speeches by officials, "Dear CEO" letters, announcement of thematic reviews, and more – none of which require public disclosure of entities or individuals under investigations prior to conclusion of misconduct, yet still increase awareness of behaviours and activities of concern, and can empower the industry to better address such issues (e.g., through better dialogue between managers and investors and improvement in practices).

Alongside these existing practices, the FCA could consider enhancing private feedback communication and remediation discussions before resorting to public disclosure. This approach allows firms to address and rectify potential issues discreetly – fostering a regulatory environment based on constructive engagement and improvement rather than punishment.

1.4 Competitiveness

While deterrence is a desired outcome, excessive regulatory visibility could stifle innovation and undermine UK competitiveness. Firms may become overly cautious and slower to adopt new technologies or innovative practices that could benefit the industry (and consumers) in fear of attracting a widely-publicised investigation in cases of any potential missteps. Along with this, firms may be deterred from locating their businesses (or affiliates) in the UK for fear of potential impacts on (global) reputation. Prospective and existing market participants may assess the business environment in the UK as being unfriendly or onerous relative to other global jurisdictions who are vigorously competing to attract financial services firms post-Brexit.

1.5 Improvement of Existing Mechanisms

The FCA already places a strong emphasis on whistleblowing as a crucial mechanism for revealing misconduct. Continued promotion of guidance related to whistleblowing, and the encouragement of voluntary disclosure of misconduct and malpractice, may help support the FCA's enforcement and supervisory work.

2. Standards and Regulatory Objectives

The SBAI has always supported regulation that leads to better outcomes for investors and consumers. Additionally, the SBAI is supportive of the sentiment behind the CP in that **better transparency from the regulator in relation to its priorities, concerns, and areas of focus should aid alternative investment managers in understanding regulatory expectations**.

However, the SBAI has also raised concerns in the past about regulations that do not improve outcomes, or worse, result in inferior outcomes for consumers or that impose unnecessary cost on the investment sector (and its clients).[4]

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[3] Enforcement actions are publicised by MAS for a period of five years (except for prohibition orders which exceed a five-year period). At the time of this response, only two investigations have been publicly announced at onset – both of which have been substantially material to involve the Singapore police. Therefore, it can be concluded that MAS, an outlier in their practice of public disclosure, has stringent standards for such disclosure. See Samlit Moneychanger Pte Ltd (2024) and CoAssets (2021) here: https://www.mas.gov.sg/regulation/enforcement/enforcement-actions/2024/two-investigated-for-suspected-fraudulent-trading-failure-to-comply-with-obligations-as-licensed-psp // https://www.mas.gov.sg/regulation/enforcement/enforcement-actions/2021/singapore-police-force-and-mas-investigate-companies-under-coassets-group

[4] For example, the SBAI was critical of the reporting requirements under EU short-selling regulations, which have recently been abandoned in the UK. See SBAI regulatory engagement on short-selling here: https://www.sbai.org/regulatory-engagement/short-selling-and-securities-lending.html

As an industry standard setter and collaborative platform, the SBAI has its own mechanisms for improving outcomes and complementing the efforts of regulators through Standards and guidance[5] – particularly in areas where a principles-based approach is more beneficial than 'blackline' prescriptive rules in allowing for the industry to remain dynamic and innovative.

3. The Alternative Investment Standards

The Standards address key areas of practice including Disclosure, Valuation, Risk Management, Fund Governance, and Shareholder Conduct. Our Standards were created through collaboration between asset managers and institutional investors and are updated via public consultation to ensure they remain relevant.

Managers achieve conformity with the Standards on a "comply-or-explain" basis and make their disclosure statements available to existing and prospective investors upon request. The Standards are as relevant today as when they were created, as demonstrated by recent industry events and regulatory actions.

3.1 Approach to Transparency & Disclosure

Investment managers who conform with the Standards agree to disclose to, and be transparent with investors, on a broad range of subjects – including those related to enforcement activities as outlined in the CP (see Standard 1.6 below).[6] It is our belief that transparency and disclosure in the alternative investment industry has improved over time and that alternative investment managers are now more open with their investors on issues and challenges that may result in reputational, societal or regulatory scrutiny. The industry itself, through Standard setting, has achieved these changes and has shown that regulatory intervention may not be required to deliver better outcomes for investors. We would note that these disclosures are made privately to investors and not released to public media for amplification and/or potential distortion.

1.6 Upon reasonable request, a manager should (unless, and to the extent that, the manager is restricted from doing so pursuant to applicable law or regulation, is instructed not to do so by any governmental or regulatory body or is restricted from doing so under confidentiality obligations owed to a third party) disclose to investors (a) any material litigation in which it is involved and (b) any material formal regulatory enforcement proceedings against it.

– For these purposes, the SBAI considers by way of example, that in the U.K., the appointment of "specific" investigators under section 168 of FSMA, or the appointment of investigators to assist overseas regulators under section 169 of FSMA; and in the U.S., commencement of a formal inquiry by the Enforcement Division of the SEC or any action which would be required to be disclosed under Item 11 of SEC Form ADV (Part 1A) or CFTC Rules 4.34(k)(1) or 4.24(l)(1) (or the equivalents in jurisdictions outside the UK or US, as appropriate) would constitute "formal" regulatory enforcement proceedings.

– The SBAI considers that the appointment of "general" investigators under section 167 of FSMA or a request for information as part of a thematic review or otherwise pursuant to sections 165 or 165A of FSMA or a notice requiring the provisions of a report under section 166 of FSMA (or the equivalents in jurisdictions outside the UK) would not constitute "formal" regulatory enforcement proceedings.

– The SBAI considers that a routine examination of a US investment adviser under section 204 of the Investment Advisers Act, or the inclusion of an investment adviser in an SEC sweep exam, would not constitute "formal" regulatory enforcement proceedings.

[5] The SBAI regularly publishes guidance and templates across a range of topics which can be found in the SBAI *Toolbox*, free to access here: https://www.sbai.org/toolbox.html

[6] The Standards are undergoing review, and as such there is scope to broaden Standard 1.6 to include disclosure of non-investment related matters, such as non-financial misconduct including harassment and discrimination. In considering materiality, managers should have regard to reputational risk and potential damages.

– For the purposes of this Standard, proceedings which the manager considers to have been brought frivolously or vexatiously are not considered to be material litigation.

Conclusion

While the FCA's ambition of improved transparency and faster enforcement aligns with the goal of improving market integrity, it is vital to balance these ambitions against the potential for significant adverse effects to market participants and end investors/consumers. By strengthening existing whistleblowing mechanisms and adopting a more measured approach to public disclosures, the FCA can better support the stability and competitiveness of the UK financial market while maintaining rigorous standards of conduct and compliance.

Should you wish to discuss any aspect of our response, we would be delighted to make ourselves available.

Yours sincerely,

Thomas Deinet

Executive Director – The Standards Board for Alternative Investments www.sbai.org