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Tuesday 16 April 2024

Dear FCA Colleagues,

Enforcement Guide and publicising enforcement investigations – a new approach

We welcome the opportunity to respond to your consultation on Enforcement Guide and publicising enforcement investigations – a new approach.

The Quoted Companies Alliance *Primary Markets Expert Group* and *Secondary Markets Expert Group* have examined the proposals and advised on this response from the viewpoint of small and mid-sized quoted companies. A list of Expert Group members can be found in Appendix A.

Overall, while the QCA recognises the importance of appropriate action being taken against wrongdoing and for enforcement to be as effective as possible, we consider the FCA's proposed approach to be disproportionate and could have a detrimental impact on firms that are later found to have committed no wrongdoing. In particular, the proposals, if implemented, could be especially damaging for smaller firms who have less resources to recover from the perception of wrongdoing.

Specifically, we raise concerns around the impact of increased scrutiny on firms under investigation, the FCA's secondary objective and the proposed reforms, the FCA's planned approach to publicising when enforcement action has not been undertaken, and the FCA's interaction with firms under investigation. We also provide a list of recommendations that we believe will, if the FCA decides to proceed with implementing these reforms, as a minimum improve some of the potentially damaging consequences of these proposals.

Increased scrutiny and impact on firms under investigation

Publicising enforcement will likely cause reputational damage and potentially financial harm to firms who may later be found innocent or even where there is fault, but no enforcement action is taken by the FCA. This is particularly relevant where an enforcement investigation is being undertaken into a listed or quoted company, as opposed to other regulated firms. For listed and quoted companies, publicised investigations carried out against them will have a particularly damaging effect on their share price. This would potentially cause financial harm to shareholders and will likely result in shareholder action.

While the FCA states that it will not publicly name individuals, increased scrutiny from investors, clients and the press may result in relevant directors and executives feeling pressured, making their position considerably more challenging and possibly untenable.

<u>The FCA's secondary objective and the proposed reforms</u>

While the consultation paper states that these changes align with its secondary objective, it is our view that these changes risk prejudicing growth and the international competitiveness of the UK. As stated above, public enforcement action could have a detrimental effect on firms that are later found to be innocent. As such, these changes could result in reputational damage to the UK market if it is perceived as more hostile to firms operating here. Financial services and markets regulators in most other major jurisdictions have not adopted a similar approach to the one being proposed in this consultation, making the FCA unique in this area. As such, we ask the FCA to reconsider the impact these changes may have on the UK's international competitiveness as a financial centre.

<u>Public announcements of non-enforcement action</u>

We recognise that the FCA states in the consultation document that, in instances where it closes an investigation without taking action, it will publicly announce details of this or will edit the original announcement on its website. However, we believe that if the FCA utilises the second option, there is a significant risk this will have limited public impact. The FCA ought to provide further information or guidelines around its proposals in this area given its fundamental importance in potentially rectifying a firm's standing and reputation in the public domain.

Furthermore, the FCA's proposed approach lacks clarity with regard to cases where the nature of the investigation changes. For example, in instances where the initial investigation is based around one area of wrongdoing, and later transforms into a separate issue. The seriousness of one allegation compared to a subsequently lesser indiscretion will be of the utmost importance to a firm who fears the impact that an investigation will have on its public standing. It is vital that the FCA, if it proceeds with these proposals, has mechanisms in place to publicly announce the change in focus of its investigation.

<u>Interaction with firms under investigation</u>

It is the QCA's view that the FCA's proposed timeline for providing a public announcement will not give firms sufficient time to engage with the FCA on the content of the announcement. Given the potential reputational damage a public announcement could have on a firm, we believe that the FCA should, as a minimum, provide more notice to firms. We propose a minimum of one month to allow sufficient engagement and the possibility of negotiation between firms and the FCA prior to a public announcement being made.

<u>Ameliorating the impact of the proposals</u>

If these proposals are to be implemented, we believe the following recommendations will go some way in ameliorating their potentially harmful impact on firms:

1. Before making public an enforcement investigation, the FCA should be required to examine the impact public disclosure will have on the firm and its stakeholders as a separate consideration when assessing whether to make an announcement.

2. A procedure should be established that allows firms to provide representations to the FCA prior to a possible announcement. This could be similar to the Warning Notice statements set out by the Regulatory Decisions Committee (RDC).

3. The FCA should monitor and publish data on its success rate from investigation to prosecution in line with the objectives set out as part of this consultation. Moreover, this should take into account the broader impact of these proposals on its secondary objective and should be assessed against this objective. We believe that this will enhance the overall transparency of the FCA's enforcement work and improve its accountability.

4. Finally, it is imperative that the FCA's new approach is evidence-based and there needs to be proper processes in place before an investigation is formally launched. The FCA should also ensure that it has the ability to be able to effectively communicate that a firm has not been convicted following an investigation.

If you would like to discuss our response in more detail, please do not hesitate to contact us.

Yours sincerely,

James Ashton.

James Ashton
Chief Executive

Appendix A

The Quoted Companies Alliance *Primary Markets Expert Group*

Samantha Harrison (Chair)	**Grant Thornton UK LLP**
Colin Aaronson	Grant Thornton UK LLP
Stuart Andrews	Zeus Capital
Mark Brady	Spark Advisory Partners Limited
Andrew Buchanan	Peel Hunt LLP
David Coffman	Novum Securities Limited
Richard Crawley	Liberum Capital Ltd
Dru Danford	Liberum Capital Ltd
David Foreman	Zeus Capital
Chris Hardie	W.H. Ireland Group PLC
Stephen Keys	Cavendish
Nick McCarthy	Shoosmiths LLP
Katy Mitchell	W.H. Ireland PLC
Hayley Mullens	Radnor Capital Partners Limited
Nick Naylor	Allenby Capital
Claire Noyce	Hybridan LLP
Jeremy Osler	Cavendish
Niall Pearson	Hybridan LLP
Mark Percy	Shore Capital Group Ltd
Oliver Pilkington	Shoosmiths LLP
George Sellar	Peel Hunt LLP
James Spinney	Strand Hanson

The Quoted Companies Alliance *Secondary Markets Expert Group*

Amber Wood (Chair)	**Liberum Capital Ltd**
Jasper Berry	Cavendish
Andrew Collins	Charles Russell Speechlys LLP
Sunil Dhall	Peel Hunt LLP
Nick Dilworth	Winterflood Securities Ltd
Fraser Elms	Herald Investment Management Ltd
Richard Fenner	Euroclear UK & International
William Garner	Charles Russell Speechlys LLP
Jon Gerty	Peel Hunt LLP
Alex Giacopazzi	Winterflood Securities Ltd
Mitchell Gibb	Stifel
Keith Hiscock	Hardman & Co

Niall Pearson	Hybridan LLP
Jeremy Phillips	CMS Cameron McKenna Nabarro Olswang LLP
Katie Potts	Herald Investment Management Ltd
Chris Robinson	Peel Hunt LLP
Stephen Streater	Blackbird Plc
Peter Swabey	C/o The Chartered Governance Institute