The City of London Law Society

4 College Hill
London EC4R 2RB

Tel +44 (0)20 7329 2173
Fax +44 (0)20 7329 2190
DX 98936 – Cheapside 2

mail@citysolicitors.org.uk

www.citysolicitors.org.uk

Law and Policy Team
Enforcement and Market Oversight Division
Financial Conduct Authority
25 The North Colonnade
Canary Wharf
London E14 5HS

By email: cp16-10@fca.org.uk

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Dear Sirs

CP 16-10: Joint FCA and PRA consultation on proposed implementation of the Enforcement Review and the Green Report

The City of London Law Society ("**CLLS**") represents approximately 17,000 City lawyers through individual and corporate membership including some of the largest international law firms in the world. These law firms advise a variety of clients from multinational companies and financial institutions to Government departments, often in relation to complex, multi-jurisdictional legal issues. The CLLS responds to a variety of consultations on issues of importance to its members through its 19 specialist committees.

This letter has been prepared by the CLLS Regulatory Law Committee (the **"Committee"**). The Regulatory Committee not only responds to consultations but also proactively raises concerns where it becomes aware of issues which it considers to be of importance in a regulatory context.

We are pleased to have this opportunity to comment on this consultation.

By way of general introduction, we strongly support the enhancement of transparency, fairness and effectiveness in enforcement decision-making processes. We welcome the proposals in the consultation paper which are focused on delivering these objectives.

Q1: Do you agree with this approach to referral decision making?

The referral criteria are helpful in setting out the factors which the regulator is likely to take into account in its referral decision-making, and in ensuring that the enforcement process is not regarded as arbitrary. We recognise that the retention of regulatory discretion is critical. Where enforcement action is brought on a selective basis, particularly following a thematic

review, it is important to provide an explanation for the selection in order to demonstrate fairness and consistency, and potentially provide added incentives in relation to subsequent behaviour.

Referral criteria and listing rule breaches

We acknowledge that in respect of those outside the regulated sector, the alternatives to enforcement action available to address market abuse are more limited, and that the FCA will wish to give greater emphasis to the seriousness and deterrence value of a particular case when making such decisions. We are however less persuaded that the same limitations remain in respect of listing breaches; we consider that the new requirements and powers introduced by the Market Abuse Regulation and the will in practice extend the possibility for the use of early-intervention tools and will extend the regulator's ability to restrict certain activities, as indeed do the Listing Principles. We would accordingly urge the regulator to reconsider the application of the referral criteria in the light of those new requirements and powers.

Providing examples of cooperation/subsequent remedial action as significant factors in decision not to take formal enforcement action

We agree that, for the reasons identified in paragraph 2.17, it is appropriate for the FCA to focus on identifying those cases where the significant extent of cooperation and remediation was a large factor in deciding not to refer a case to enforcement, or in other significant enforcement decision-making. We would encourage the regulator to seek to identify more examples of such cases; we consider these examples to be particularly helpful for firms whose relationship with the regulator is limited to the contact centre, and for their employees.

Identifying the right regulatory response

Although it is not entirely clear from the consultation paper what steps the FCA will take towards regularly reviewing the performance and composition of its Steering Groups, we acknowledge the FCA's commitment to continue to keep the framework under review; it would be helpful if the outcome of such reviews were referred to in the Annual Report. The publication of the referral criteria, and of the summary of the referral process and framework, provides helpful clarity.

Transparency of enforcement activities

Whilst the annual publication of information about disciplinary outcomes through the Enforcement Annual Performance Account, and the feedback from thematic reviews, are very valuable in helping firms ensure firm- or scenario-specific lessons are learnt, these only become available long after the event.

We are of the view that it would be possible for the regulator to publish more by way of early warnings through soft guidance mechanisms (e.g. Dear CEO letters, newsletters) which reflect issues and concerns which are in fact emerging from its enforcement work.

By way of example, we have experience of supervision teams taking positions which at the time appeared to depart from previous guidance, but which, it subsequently transpired after the publication of a Final Notice many months later, reflected an early regulatory response to concerns were being identified in a particular ongoing particular enforcement case. To the extent that early warnings are present, it seems to us that they could communicated to a much wider group of firms through soft guidance publications than through ad-hoc supervisory interactions.

We fully recognise the importance of ensuring that any such messages should not identify a firm or individuals subject to investigation or ongoing enforcement action. It seems to us that the risk of identification through the publication of warning notice statements, which focus on specific conduct, may be higher than that to which the publication of generic Dear CEO and other soft guidance may give rise.

Q2: Do you have any comments on the proposed implementation of the Green Report?

PRA

We look forward to the publication of the PRA's enforcement referral framework later this year, and we welcome the fact that the referral analysis is to be structured to identify the firms and individuals in respect of whom the threshold for launching an investigation appears to be met, and then apply the referral criteria to each potential subject. We also consider that having decisions to open investigations taken by joint decision of the Head of the Regulatory Actions Division and the Head of Division or Director of the supervisory area concerned ensures a suitable level of seniority within the PRA.

FCA

We welcome the fact that the Enforcement Referral Document now includes a table setting out all potential subjects, and a summary of the circumstances and reasons why a firm or individual is or is not being referred. Although the FCA's arrangements provide for decisions to be taken at a less senior level than those of the PRA, we acknowledge that this reflects both the difference in their regulatory objectives and the substantially larger population of firms within the FCA's enforcement remit.

Q3: Do you agree with the approach outlined above? Are there any particular adjustments that you consider should be made in respect of the process of involving supervisors in the investigation phase?

We consider that the approach outlined by both the PRA and the FCA should serve to enhance cooperation between the regulators in enforcement investigations. We consider that there should be a degree of flexibility in the timing of the proposed quarterly meetings, in order to accommodate specific developments or milestones in the investigation phase, and to ensure that these meetings are meaningful in terms of progressing the case.

We agree that the inclusion of standing agenda items to review the appropriateness of the proposed scope of, or of continuing with, the investigation, and to consider potential new subjects arising for investigation, and of maintaining a record of the reasons for the decisions taken. We would urge the regulators to inform subjects promptly of any decision not to continue with an investigation into their role, both as a matter of fairness, and in view of the ongoing requirements on regulated authorised persons (potentially to be extended to all regulated firms) to make annual assessments of fitness and propriety in respect of their senior managers and certified persons.

Q4: Do you agree that the PRA and the FCA should identify the information requested by each regulator within the same information request?

Yes – whilst we welcome the use of "joint" requests for information, we consider that identifying the information requested by each regulator enables the requesting investigator to demonstrate that the test which is the pre-condition for the exercise of the relevant statutory powers is met (e.g. whether the information requested is relevant to, or the requirement is necessary or expedient for, the purposes of the investigation).

Q5: Do you agree with the above approach in respect of the initial notice of investigation?

The provision of more information in conjunction with, or as part of, the Memorandum of Appointment of investigators would be most welcome. Having an understanding of the breaches alleged and an explanation of the context and matters said to give rise to those breaches, together with an explanation of the criteria relied on in reaching to the decision to refer, will assist the subjects in understanding both the case being made, increase the potential for constructive scoping, and also serve to facilitate more meaningful settlement discussions at an earlier stage.

It would be helpful, particularly in cases where one firm appears to have been singled out for enforcement as a result of behaviour which may be prevalent across a wide number of peers, for the explanation of the decision to refer to highlight the factors which led to that firm being referred, and not others.

Q6: Do you agree with the regulators' proposals around the scoping meetings?

We agree that, in principle, scoping meetings would be more meaningful if they take place once investigators are in a position to share their indicative plans on the direction of the investigation and the timetabling of key milestones. We also agree that the regulators should retain some flexibility, as some subjects may benefit from an explanation of the process at an earlier meeting, recognising that discussion of timetabling and scope may then need to be dealt with at a later stage.

It remains also critical that firms and individuals should be able to discuss the practical implications of proposed document retention and production requests with the investigation team at an early stage. Whist we recognise that this generally happens, there have very occasionally been instances of requests so wide or so time constrained that compliance is simply practically unfeasible – these issues are generally readily resolvable but we would be concerned if later scoping meetings were to result in this becoming a more frequent issue.

Q7: Pending consideration of whether it may be appropriate expressly to incentivise admissions at scoping meetings (in the context of the FCA's forthcoming review of its penalty policy and the PRA's forthcoming review of its settlement policy), do the regulators' current approaches to discounts for early settlement provide sufficient incentive for early admissions at scoping meetings?

We do not think that the discounts for early settlement provide a significant incentive for early admissions at the scoping meeting stage. Currently, the subject of an investigation generally does not have sufficient information at this stage to assess the nature of the case being made against them or to understand the full extent of the misconduct alleged.

Admissions should be made on a fully informed basis. We are aware of instances of early admissions having been made in the context of anti-trust/competition leniency applications, in respect of alleged breaches, which ultimately were not established as breaches in other contested proceedings. We recognise that it is possible that the furnishing of additional information at the point of issuing the Memorandum of Appointment will be of some help to the subject in this context.

However the importance of balancing the desirability of a quick resolution and a proper understanding of the extent of the misconduct alleged is not solely an issue for the regulator, and is fundamental to a fair process.

Q8: Do you agree with the above approach to supervisory involvement in enforcement investigations?

We agree that it is helpful that supervisors of relationship-managed firms should ordinarily attend scoping and progress meetings with the firm under investigation, and that the extent of information already held by supervisors should be checked to avoid unnecessary information requests being sent to the firm. Even where the firm under investigation does not have a dedicated supervisory contact, there may well be merit in involving the head of the relevant specialist sector team, to enable investigators to draw on the supervisory team's expert knowledge.

Q9: Do you agree with the above approach to periodic updates in the context of enforcement investigations?

The proposal to provide periodic updates or state of play meetings on a regular, at least quarterly basis, covering progress to date, next steps and indicative guidelines, should provide a helpful degree of transparency - as indicated at question 3 above, the timing should allow for some degree of flexibility to enable the updates to be as meaningful as possible. The proposal to hold these meetings or updates with both regulators in joint investigations and to coordinate the respective enforcement processes where possible is welcomed.

Q10: Do you agree with the proposed approach set out above to constructive engagement in the context of enforcement investigations?

We are supportive of the ongoing involvement of senior staff throughout an investigation, and of the proposal to provide training to enforcement staff, including investigators, who are PRA/FCA employees. We believe that these steps, together with the FCA's commitment to ensuring the right level of experience in each investigation team, should help to maintain consistency of, and confidence in, the enforcement process.

Q11: Do you agree with the proposed list as constituting those factors that the regulators will take into account in considering whether to grant an extension of time to respond to a PIR or warning notice, in full or in part? Are there any further factors that you consider should be taken into account?

We agree that the legal and factual complexity of the case, and the existence of factors outside the subject's control that would materially impact on its ability to respond within the period, should be taken into account. Whilst having had a genuine opportunity to respond to the PIR may be relevant, it will not where the regulator's case has changed materially from the case set out in the PIR. The list of factors is presently framed as being non-exhaustive and we believe this to be the correct approach. Applications for extension should be considered on the individual merits of each case and there may be material factors which are entirely personal to the subject (absence, timing of service of the PIR/warning notice) which might militate for an extension.

Q12: Do you agree with the proposed changes to the pre-Stage 1 process?

The proposal that the FCA should provide advance notification of stage 1 is helpful and enables both the FCA and the subject to make the necessary arrangements. The inclusion of preliminary meetings as part of this pre-Stage 1 process – providing the subject with a summary of the key legal and factual bases of the case (including an update on any changes to the FCA's case following the PIR or the provision of the draft warning notice) and identifying the key evidence the regulator relies on – is critical to ensure the focus and effectiveness of the Stage 1 process, and to help identify any potential factual errors.

Q13: Do you have any comments on the proposed approach to the information provided at Stage 1?

We believe that it would be helpful to identify at as early a stage as possible the key evidence on which the FCA's case relies in order to assist the subject to make an informed decision about whether to resolve disputed allegations by agreement. For consistency of approach, this might be done by schedule or spreadsheet referencing the relevant material.

We recognise that having identified that evidence, there would not be an expectation that the FCA should furnish copies of evidence which the subject has, or has already had, access to.

We note however that a firm will not always have had access to transcripts of interviews conducted with its employees and that such material can be voluminous and time consuming to review. Where the volume of material previously not seen by the subject is considerable, then it would be helpful to have that material in advance of the formal triggering of stage 1; alternatively consideration should be given to extending the stage 1 period (see 17 below).

Q14: Do you agree that the FCA should amend DEPP and EG to make provision to contest penalty only before the RDC?

Yes. We support the proposal to amend DEPP and EG to make provision for partially contested cases, and for the availability of the settlement discount in respect of such cases. We believe that this should assist in streamlining the enforcement process in suitable cases. We also consider that having the appropriate outcome determined by a decision maker at greater remove from, and not involved in the supervision of, the investigation team involved in developing the case theory, and establishing the evidence to support it, would enhance confidence in and transparency around the penalty process and incentivise earlier resolution.

Q15: Do you have any comments on the proposed framework and procedure for contesting penalty only?

We are not entirely clear on how the FCA envisages the sequencing of the proposed procedure.

We understand that the focused resolution agreement would include agreement by the FCA and the subject that they will not seek to contest the facts and liability as set out in the warning notice when making representations to the RDC or on any subsequent reference of the matter to the Tribunal. Plainly, in order to reach that agreement, the subject must know what the warning notice will say.

However, the paper also suggests that if the SDMs accept the resolution, they will then give a warning notice setting out the facts and liability, and effectively set out the FCA's submissions on penalty. RDC will then make any necessary arrangements for representations. The SDMs will also consider whether or not to publish information about the warning notice after consultation with subject. This suggests that the issuance of the warning notice in fact post-dates at least the agreement in principle to, if not the execution of, the focused resolution agreement.

Draft DEPP 5.1.8C G suggests that the focused resolution agreement **may** refer to a draft of the proposed warning notice. We also note that DEPP 6.7.3(2) provides that the communication of the FCA's assessment of the appropriate penalty for the purposes of DEPP 6.7.3 G(1) will not be in a prescribed form but ***may*** include the provision of a draft warning notice.

Plainly, in order to agree to all relevant issues of fact and all issues as to whether those facts amount to a breach (or more than one breach) as alleged in a warning notice issued

following the signature of the focused resolution agreement, the subject must have assurance regarding the text of the warning notice to be issued in so far as it relates to facts and liability in respect of breach or breaches. That text should accordingly be appended to the focused resolution agreement and the regulator must commit to that text. We assume that this is in fact the intention, given that both the FCA and the subject will be waiving their rights to depart from the agreed position as set out in the focused resolution agreement.

With regard to the decision to publish a warning notice statement, we infer that the intention is that the subject would have the same rights to be heard on the issue of publication as in any other case. It seems to us however that it should be possible to reach an agreement regarding the issue of publication as part of the focused resolution agreement process, and that the subject should have certainty about what the regulator proposes to say **before** waiving its rights.

In making representations on penalty, it should be open to the subject to lead evidence of facts over and above the agreed facts before the RDC in support of representations in mitigation relation to the determination of the appropriate outcome – for example facts regarding personal hardship - although we recognise that such facts should not be inconsistent with the agreed facts.

Q16: Do you have any comments on Alternatives 1 and 2?

It seems to us that the alternative proposals put forward by the FCA could also yield benefits in terms of efficient and swift resolution, and potentially providing more detailed and earlier guidance for firms and individuals.

The alternative proposals envisage a partially contested process in relation to:

- Cases where there is agreement on all relevant facts but not on whether they amount to a breach, in respect of which the RDC would have discretion to award a discount within a specified range (e.g. 15% - 30%):

It seems to us that in such a case the issues in dispute will have been considerably narrowed, such that the RDC's decision would be limited to assessing whether the agreed facts amount to one or more breaches. If they do not, then the matter of penalty does not arise at all. If they do amount to some or all of the breaches alleged, then the question of penalty – and therefore potential discount – would fall to be determined by the RDC. In determining a potential discount, the RDC would make an assessment of the value of the saving in resource achieved by the early agreement as to the facts, and exercise its discretion in applying a discount within the specified range. We believe that in practice such cases would be relatively rare.

- Cases involving a greater range of contested issues that could still leave a number of issues of fact, liability and penalty unresolved, in respect of which the RDC would have discretion to award a discount within a broader specified range (e.g. 0% - 30%).

We recognise that in relation to this categories in particular, the question of the credit which should be given to a subject by the RDC is more complex, and, depending on the extent of issues in contention, that the potential saving in resource would be reduced. It seems to us nevertheless that it should be possible to agree a list of agreed issues of fact and liability, and a list of the facts and liability still in contention, in advance of the hearing.

It seems to us that both the FCA and the subject would be likely to be able to make a meaningful assessment of the saving in resource and time, if any, achieved through the early agreement of a material number of facts and issues. Whilst the assessments might diverge somewhat, we believe that the RDC would be well positioned to consider those views, and

taking into account the contested matters it did hear and determine, make its own assessment the credit that should be given for those early admissions.

We recognise that the RDC is bound by FCA policy and must therefore interpret provisions in accordance with the FCA's view, and accordingly we acknowledge that where the issue in contest is purely a matter of legal interpretation, that would fall to be referred to the Upper Tribunal or the Court of Appeal, although the question of penalty might then be referred back to the regulator.

Q17: Do you have any comments on this approach to extending Stage 1?

We agree that in complex cases a longer Stage 1 period will be appropriate. We consider that complexity should be considered on a case by case basis, and we would add to the examples of complex cases those cases which are extremely factually complex and in which the subject is presented with a considerable volume of material previously unseen by them which cannot sensibly be reviewed within a 28 day period – which is arguable a factor outside the firm's or individual's control and which would materially impact their ability to engage in settlement discussions in the Stage 1 period.

We agree that withdrawal of the Stage 1 letter is likely to be the more appropriate course in cases where new information has come to light that would materially affect the FCA's findings or proposed disciplinary outcome making the previously-set Stage 1 period unreasonable.

Q18: Do you have any comments on our proposed approach to implementing the Review's recommendations on representations in settlement discussions?

We welcome the proposed amendment of EG to confirm the engagement of senior members of staff in discussions, by acting as the case sponsor, and liaising where appropriate with the settlement decision-makers and by attending a without prejudice meeting during discussions or arranging for the attendance of an appropriately senior FCA representative.

Q19: Do you have any comments on the proposed discounts for partly contested cases? In particular, should there be a difference in discount between cases that settle fully and those that contest penalty only?

We agree that a 30% settlement discount should be available for cases that in which only the decision as to the appropriate outcome is referred to the RDC for determination. This aligns squarely with the approach to guilty pleas in criminal proceedings, and we do not consider that there should be a difference in discount between cases that settle outright, and those that refer the determination of outcome to the RDC.

Q20: Do you agree with the proposal to accept the Review's recommendation to abolish Stage 2 and Stage 3 discounts?

We do not agree that the Stage 2 and Stage 3 discounts should be abolished. We recognise that these are relatively infrequently used, but we believe that the availability of this sliding scale reflects benefits which inure to the regulator through early resolution - enabling other cases to be disposed of more expeditiously, saving of resource and cost, and potentially of witnesses from the concern about having to give evidence. We are also aware that in some large and complex institutions, or in complex cases, the Stage 1 period does not always afford the subject sufficient time to complete its decision-making process about whether to resolve disputed allegations by agreement.

Q21: Do you agree with the proposed approach to ongoing settlement review?

We support the proposal that the RDC should monitor of the effectiveness of the recommended changes to the settlement process, identify any settlement process lessons to be learned, and make generic public recommendations. We strongly believe that this should assist in ensuring consistency, and, through publication of the RDC's report, enhance transparency.

Q22: Do you agree with our proposal for access to the Tribunal without representations being made to the FCA's decision maker?

We support the proposal to formalise the ability of a subject to access to the Tribunal without representations being made to the FCA's decision maker and agree that it would be helpful to draw attention to this option in the letter accompanying the warning notice. It would also be helpful for this option to be highlighted on the FCA's website in the section explaining the Enforcement process.

We recognise that where an enforcement case has more than one subject, it is not inconceivable that an individual might opt for direct Tribunal access while others do not. We anticipate that in such circumstances the FCA would propose to defer publication of the Decision Notice in respect of that individual until the point at which it would propose to make a warning notice statement in respect of the remaining subjects, but it would be helpful if the FCA would clarify what its approach would be.

Q23: Do you consider that there are other matters that the RDC could usefully report on?

We support the proposal that the RDC should publish its report not only on its operational performance, including the time taken to deal with contested cases following submission of papers by investigators, but also on its review of its membership, and the sufficiency of its resource, alongside the FCA's Annual Report. It would also be helpful to publish feedback on its review of the effectiveness and fairness of the revised settlement process from the perspective of all interested parties and the extent to which it contributes to a consistency of approach.

Q24: Do you agree with the proposal that, usually, the panel that gave a warning notice will be the same panel that considered representations and decided whether or not to give a decision notice?

We would be disappointed if the FCA were to amend DEPP 3.2.3G as proposed. We note that no explanation or justification is proffered for the change proposed, although we do recognise that there is a cost in maintaining a large panel. The current provision already gives the RDC flexibility to adapt its approach on a case by case basis. We believe that the present guidance serves to underscore the perception of the RDC's independence from the enforcement team by ensuring that the panel which considers representations and determines whether or not to give a decision notice should include at least one person who did not first propose the decision (through the issue of the warning notice). This perception is important to ensuring confidence in the process, and could be particularly beneficial in ensuring the success of the proposal for the resolution of partially contested cases (alternatives 1 and 2). We also believe that there can be real value in bringing a fresh pair of eyes to the decision.

If amendment is necessary, we would suggest that DEPP 3.2.3G should state that the composition and size of panels of the RDC may vary depending on the nature of the particular matter under consideration, and leave determination of the size and composition of the panel to the RDC chairman, taking into account its efficient operation and any specific experience needed in any particular case.

If you would find it helpful to discuss any of these comments then we would be happy to do so. Please contact Karen Anderson by telephone on +44 (0) 20 7466 2404 or by email at Karen.Anderson@hsf.com in the first instance.

Yours faithfully

Karen Anderson
Chair, CLLS Regulatory Law Committee

THE CITY OF LONDON LAW SOCIETY
REGULATORY LAW COMMITTEE

Individuals and firms represented on this Committee are as follows:

Karen Anderson (Chair, Herbert Smith Freehills LLP)
Matthew Baker (Berwin Leighton Paisner LLP)
David Berman (Macfarlanes LLP)
Peter Bevan (Linklaters LLP)
Margaret Chamberlain (Travers Smith LLP)
Simon Crown (Clifford Chance LLP)
Richard Everett (Travers Smith LLP)
Robert Finney (Holman Fenwick Willan LLP)
Angela Hayes (King & Spalding International LLP)
Jonathan Herbst (Norton Rose Fulbright LLP)
Mark Kalderon (Freshfields Bruckhaus Deringer LLP)
Etay Katz (Allen and Overy LLP)
Ben Kingsley (Slaughter and May)
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Stuart Willey (White & Case LLP)
Brian McDonnell (Addleshaw Goddard LLP)