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The Rt. Hon Nicky Morgan MP
Treasury Committee
House of Commons
London
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18 July 2019

Our Ref: SA190715A

Dear Nicky

I am writing to you following our correspondence of October 2018, relating to the risks private polling data might pose to the integrity of the UK's financial markets.

In your letter of 24 October you requested that I update you following discussions with the relevant stakeholders. I can confirm that we have since met with the British Polling Council (BPC), the Market Research Society (MRS) and the Electoral Commission as well as several polling firms to understand more about how polling is undertaken and their remits.

You asked five detailed questions in your letter which I will answer below in Annex A, but I think the underlying question you ask is whether more needs to be done to prevent private polling being used to give a trading advantage in advance of election results.

Financial services legislation does not prohibit polling of members of the public. Nor does electoral law.

However, there is a public policy interest in restricting the public availability of polling information while polls are open. As we understand it, the law in this area is set out in the Representation of the Peoples Act of 1983 rather than financial services legislation. It would fall to law enforcement authorities other than the FCA to determine if a polling company providing information to a hedge fund or other financial institution was consistent or not with electoral law prohibiting the publication to the "public...or any section of the public" of "any statement relating to how voters have voted or any forecast as to the result of an election before the poll is closed".

The market abuse regime (and specifically the Market Abuse Regulation (MAR)) may be engaged where information is not publicly available, is precise and is likely to have a significant impact on the price of a regulated financial instrument. The provisions of MAR could therefore become engaged in certain circumstances. For example, if an established polling firm is due to publish polling results and on publication the results are likely to affect the price of government bonds traded on regulated trading venues and meet the other criteria to be classified as inside information, then it could be an offence under MAR to share that information prior to publication other than where necessary "in the normal exercise of employment, a profession or duties".

It could also be an offence for anyone in possession of the information to trade in the relevant government bonds in advance of publication of the polling results if it is trading on the basis of the anticipated bond price movement that will result from publication of the results.

The Market Abuse Regulation does not, however, impose a general restriction on individuals and firms collecting or receiving polling information that is relevant to financial market prices but is not inside information, even while polls are open.

It is also important to note here that currencies, and the exchange rates between them, are not regulated financial instruments.

In other words, it would not be effective to rely on MAR to restrict the sharing of polling information that is not inside information while polls are open. Nor – outside particular circumstances, which financial firms and polling firms would need to assess on a case-by-case basis – can MAR be relied upon to prevent trading using this information.

We appreciate that this raises important questions of fairness. Given that public interest in how voting data are used goes wider than financial regulation, we think it would be a matter for Parliament and Government to consider whether tighter restrictions on the generation, distribution, and publication of these data during the window when polls are open would be appropriate. We would be happy to offer our thoughts on how such tighter restrictions would interact with the market abuse regime if that would be helpful.

I hope that this is helpful,

Yours Sincerely
Andrew

Andrew Bailey
Chief Executive

Annex A

How the FCA's regulatory remit interacts with the work of the members of the BPC and MRS

Polling and market research are not regulated activities. These firms do not require FCA authorisation. The FCA's regulatory perimeter, in general, only extends to the authorised firm population, but there are some exceptions, such as market abuse, where all firms and individuals are in scope of our regulatory remit.

Whether current regulation, rules and codes of conduct governing the polling industry are sufficient to mitigate the risk that the use of private polling may breach market abuse regulation

Polling firms have confirmed to us that they do provide to financial institutions anonymised and aggregated data on how individuals have voted while polls are open. We note that electoral law prohibits the publication of any statement relating to how voters have voted or any forecast as to the result of an election to the "public ... or any section of the public" before the poll is closed. It is a matter for law enforcement authorities other than the FCA as to whether a polling firm providing such data to a financial institution is in breach of this law.

While there are some circumstances in which data on how people have voted and related forecasts could classify as inside information under the Market Abuse Regulation (MAR), this would depend on a range of factors, which would need to be applied on a case-by-case basis.

Where all these factors apply, disclosing the data, other than where necessary in the normal exercise of employment, a profession or duties, would be an offence. So too would be trading of in-scope instruments on the basis of the data. Whether or not such data were inside information would need to be judged on a case-by-case basis as noted above. In many cases, however, it would not be.

We note in particular, that trading in spot FX is not covered by MAR (except to the extent such trading affects other financial instruments that are subject to that Regulation).

Whether in their discussions with you BPC and/or MRS agreed to take action or consult on any with their members

Both BPC and MRS said they are willing to raise awareness amongst their members of the risks of market abuse during the polling process and encourage firms to implement appropriate systems and controls. We will continue to liaise with them to progress this.

Whether greater regulatory oversight of market sensitive polling could be required to mitigate fully the risk of breaches of market abuse regulations

I would like to state clearly that, if there is a public policy desire to prevent polling information being provided to selected parties such as trading firms before polls close, market abuse regulations do not achieve this.

In general, we think that markets work better, and investor confidence in market prices is maximised, if investment decisions and prices are based on facts and evidence. Collection, analysis and public availability of data support efficient market functioning.

One reason why data on how votes are cast differ from other data in this respect is the prohibition, for wider public policy reasons, on publication of these data under electoral law until polls have closed. This raises an important question about how it can be fair for some trading firms to be given this information when communication to the public is prohibited.

Given that public interest in how voting data are used goes wider than financial regulation, we think it would be a matter for Parliament and Government to consider whether tighter restrictions on the generation, distribution and publication of these data during the window when polls are open are appropriate.

Whether the FCA is investigating or making preliminary steps towards a possible investigation of whether any uses of private polling data have contravened market abuse regulations

To ensure the integrity of our investigations, we are unable to comment on any existing or potential cases that we may be investigating.