

FCA SETS OUT ITS APPROACH TO ENFORCEMENT

In April 2017, the FCA published its Mission and committed to giving further details about how it proposes to regulate firms and individuals in the financial services sector. On 21 March 2018, it published a consultation paper setting out its approach to enforcement (alongside a separate paper detailing its approach to supervision). The approach documents are open for consultation until June, with the intention that the final versions will then be published in late 2018.

THE FCA'S ENFORCEMENT OBJECTIVES

The enforcement approach document reflects objectives which have existed since Mark Steward became the FCA's Director of Enforcement and Market Oversight in July 2015. In particular, it emphasises the FCA's intentions to:

- use its full powers, including its criminal and competition investigation powers, to initiate investigations (in combination with each other as necessary).
- conduct more investigations more efficiently, including by stopping them promptly where it is clear that there is no serious misconduct.
- investigate a wider range of misconduct, with a particular focus on market manipulation and money laundering offences.
- use a wider range of enforcement tools such as prohibitions, suspensions and restorative measures in addition to financial penalties (which the FCA identify as insufficient to prevent serious misconduct).
- encourage firms to voluntarily identify and remedy misconduct, including by imposing more severe sanctions on those who fail to address harm.

To some extent these objectives are reflected in enforcement activities and outcomes that we have seen over the last few years. In particular, we have seen more investigations being opened and closed, a greater number of investigations relating to market abuse and AML and increased use of alternative tools in addition to or alongside penalties.

DETAILS OF APPROACH

The approach document also provides further details of the FCA's current approach to enforcement at the various stages of an investigation.

Opening an investigation

Following the recommendation in the Andrew Green QC report into the FSA's enforcement actions following the failure of HBOS, the FCA has taken care to apply the statutory evidential threshold for opening an investigation of "circumstances suggesting" a breach of the rules. The approach document makes clear, however, that this does not mean the FCA intends to open investigations wherever such circumstances exist.

The FCA intends to focus on certain types of cases – those potentially involving "serious misconduct" – a concept which does not appear in the current Enforcement Guide. The FCA provides a broad non-exhaustive list of factors which are relevant to determining whether misconduct is potentially "serious", including the nature and severity of the actual or potential harm, whether the misconduct may have involved any lack of fitness and propriety (with particular reference to lack of integrity).

In addition, the FCA states that it intends to treat availability of evidence as a factor relevant to determination of the seriousness of misconduct. It also acknowledges that historic events are harder to investigate in part because evidence may not be available. Taken together, these indications may be seen as an effort to provide a basis for moving on from investigating historic events which some within the FCA consider to be a drain on resources.

The approach documents also emphasises the use of data as a means of identifying circumstances which warrant investigation. In this respect, the FCA has previously suggested that it has heavily invested in technology to analyse complex data and expects regulated firms to do the same. In this way, firms may precipitate "a step change in both the volume and quality" of reported data to ensure completeness and accuracy.

Carrying out investigation

The approach document identifies the FCA's increasing use of investigations as a diagnostic as well as a disciplinary tool. It raises the possibility of initiating investigations on several different statutory bases concurrently, in order to "quickly identify the heart of the case".

The approach document also suggests that, in circumstances where investigations have been brought under multiple statutory bases, it will "not decide straight away" the nature of any breach being pursued, but will rather wait until it "fully understands what may have happened". This is likely to make attempts made by firms at an early stage to persuade the FCA to narrow the scope of an investigation, or to stipulate how particular conduct will be dealt with, more difficult.

Threshold for taking disciplinary action

The current Enforcement Guide does not clearly define the circumstances in which the FCA will take action following an investigation. The approach document seeks to define those circumstances as "where there is sufficient evidence of serious misconduct and where [the FCA] is prepared to take action".

One reason for defining this threshold may be that FCA wants to adopt a greater risk appetite in disciplinary action, namely to make decisions which have a greater likelihood of being successfully challenged at the RDC or Tribunal. This change is of particular importance to individuals covered by the Senior Managers Regime, who have a statutory duty to take "reasonable steps" to avoid breaches of regulatory requirements in areas for which they are responsible.

The FCA's increased risk appetite underlines the importance of these individuals making sure that they are fully aware of the boundaries of their responsibilities and of ensuring that, in the event of a breach by the firm, they are able to demonstrate to investigators approaching their conduct with the benefit of hindsight that their actions (or inactions) were reasonable in all the circumstances.

Penalties

The approach document indicates that the FCA has started a review of its penalty policy (a consultation paper for which will be published later this year) and the Enforcement Guide in the FCA Handbook (a consultation paper for which will be published in 2019).

CONCLUSION

While the approach document does not represent a radical departure from established FCA practice, we anticipate a challenging regulatory environment for market participants in 2018 and beyond.

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