

Financial Services Regulatory Alert

February 6, 2017

Financial Conduct Authority and Prudential Regulation Authority Publish Final Changes to Enforcement Decision-Making Processes

On 1 February 2017, the Financial Conduct Authority (FCA) and the Prudential Regulation Authority (PRA) published a policy statement which outlines the changes that will be made to the regulators' enforcement policies and processes ("Policy Statement").¹ The FCA and the PRA have said that the changes are aimed at "strengthening the transparency and effectiveness of their enforcement decision-making processes."²

Key Changes

The FCA has already implemented some of the proposals it discussed in the course of consultation. For example:

- Initial notice of investigation – When a decision to refer a matter to enforcement for investigation is made, the FCA will set out in writing (and give to the subject under investigation at the time a Memorandum of Appointment of Investigators is issued) a succinct summary of the potential breaches, an explanation of the matters giving rise to those breaches and an explanation of the criteria it has applied in coming to the decision to refer.
- Regular review of the Regulatory Decisions Committee (RDC) – The FCA now publishes an annual review of the RDC (the first of which was annexed to the FCA's most recent annual report). The annual review considers matters such as the extent to which the RDC membership includes expertise appropriate to the areas in which the FCA is likely to take action and operational performance.

In addition, the FCA confirmed that the following proposals will come into effect on 1 March 2017:

- Introduction of partly contested cases – This will allow a person under investigation to agree to some elements of a case (e.g., the facts, liability and/or appropriate penalty) and contest the other elements before the RDC while retaining the ability to obtain a discount on the penalty that reflects the extent to which the issues had been agreed.

¹ See Policy Statement FCA PS17/1 / PRA PS2/17: *Implementation of the Enforcement Review and the Green Report*, which is available here: <https://www.fca.org.uk/publication/policy/ps17-01.pdf>.

² FCA press release "FCA and PRA publish final changes to enhance enforcement decision-making processes," 1 February 2017.

- Abolition of Stage 2 and Stage 3 discounts to penalty in settlement³ – This means that, in order to obtain a discount to the penalty, a firm or individual under investigation must settle with the FCA by the end of Stage 1 of the enforcement process (i.e., prior to a Warning Notice being issued). However, the FCA's introduction of partly contested cases means that the subject under investigation can still obtain a discount to the penalty without settling all elements of the FCA's case.

The PRA has said that it intends to publish a short guide to its enforcement procedures (including its referral criteria) and an additional policy statement on the establishment of an Enforcement Decision-Making Committee. It will also conduct a review of its approach to settlement.

What You Need to Do

Financial services firms and individuals that are currently, or that expect to be, subject to FCA and/or PRA investigation should ensure that they understand the changes outlined in the Policy Statement. They are strongly encouraged to speak to their advisers early and to consider with their advisers whether their approach in existing enforcement matters remains appropriate.

Background

Consideration of changes to the regulators' enforcement decision-making processes was placed in the spotlight in 2014 when Treasury published its *Review of enforcement decision-making at the financial services regulators* ("**Enforcement Review**"). A year later, it reappeared on the reform agenda with the regulators' publication of (i) a joint report into the failure of HBOS plc and (ii) Andrew Green QC's *Report into the FSA's enforcement actions following the failure of HBOS* (the latter more commonly known as the "**Green Report**").

In April 2016, the regulators published a joint consultation paper, which outlined their proposals in connection with the implementation of recommendations made in the Enforcement Review and the Green Report ("**Consultation Paper**")⁴. The Policy Statement follows from the regulators' consideration of submissions to the Consultation Paper. In total, there were 13 submissions to the Consultation Paper.

³ The FCA operates a discount scheme for early settlement (set out in DEPP 6.7) where a discount of 10 percent, 20 percent or 30 percent is applied, depending on the stage of the proceeding (Stage 1, 2, 3 or 4) at which a settlement is reached.

⁴ See Consultation Paper *FCA CP16/10 / PRA 14/16: Proposed Implementation of the Enforcement Review and the Green Report*, which is available here: <https://www.fca.org.uk/publication/consultation/cp16-10.pdf>.

Contact Information

If you have any questions regarding this alert, please contact:

Helen Marshall

helen.marshall@akingump.com

+44 20.7661.5378

London

Rosemarie Paul

rosemarie.paul@akingump.com

+44 20.7661.5313

London