

***Mr Stuart Forsyth v (1) the Financial Conduct Authority (2) the Prudential Regulation Authority
Upper Tribunal (Tax and Chancery Chamber) - Reference Nos: FS/2019/021 & FS/2019/022***

FCA actions in response to recommendations made by the Upper Tribunal pursuant to section 133A(5) of the Financial Services and Markets Act 2000:

1. *The FCA should consider whether its staff are adequately trained and have an adequate understanding of the importance of proper records management in the context of potential enforcement proceedings and the consequences that could follow if those procedures are not followed.*

The FCA accepts this recommendation and is taking forward additional steps to ensure that its staff are adequately trained and understand the importance of proper record keeping. This work builds upon previous guidance and regular mandatory training for staff on records management, and is part of current cross-FCA projects regarding records management, including: (a) the movement of the FCA's records management store into a new cloud-based system, (b) additional mandatory records management training delivered, addressing the importance of proper records management in the context of potential enforcement proceedings, (c) guidance and training in its Supervision division on record keeping, including the storage of general Supervision records which refer to specific firms, and (d) ongoing work in response to the Independent Reviews.

2. *The FCA should review its procedures for dealing with requests for disclosure of documents made after the usual disclosure process has been completed.*

The FCA has updated Enforcement's disclosure training and guidance to reflect the matters raised in the judgment about dealing with requests for disclosure of documents made after the usual disclosure process has been completed. Training is conducted on a rolling basis throughout the year for staff.

3. *The FCA should review the adequacy of its Disclosure Memorandum in its current form and whether it is fit for purpose as it is currently being used. Legally privileged material should be kept separate to other material.*

The FCA has reviewed the Disclosure Memorandum in the context of Enforcement's broader disclosure system and functionalities, and has concluded that it is adequate and fit for purpose for the role it has within that system.

The FCA does not consider that it is practicable for all *internal* LPP material to be separated from other material as soon as it is generated. Enforcement's disclosure guidance has been updated to highlight that where investigators identify that there is an internal document which is relevant to limitation and consider that this is a "protected item" for the purposes of section 413 of the Financial Services and Markets Act 2000 then this should be considered by a lawyer.

4. The FCA should make an assessment as to when the relevant limitation period begins which should be regularly reviewed as new information comes to its attention.

The FCA has updated Enforcement's guidance and training to emphasise the importance of reviewing the original limitation assessment after new information comes to light. Training is conducted on a rolling basis throughout the year for staff.

5. The recommendations set out above are equally applicable to the PRA, as appropriate. In addition, the PRA should undertake a full review of its processes for the recording of supervisory and other information that may be relevant to possible enforcement actions.

This recommendation is not applicable to the FCA.

6. The approach to joint investigations should be reviewed. Where the conduct concerned falls equally within the scope of both Regulators consideration should be given as to whether there should be a single investigation by one of the Regulators and a single regulatory decision.

On a case-by-case basis, Enforcement will continue to consider at a senior level whether it is appropriate for there to be a joint investigation or a single investigation, in consultation with the PRA and taking all relevant matters into consideration.