
PROTOCOL

For the conduct of the review of the enforcement response in light of the failure of HBOS

A. Introduction

1. Counsel has been appointed by the FCA and the PRA (“**the Regulators**”) to carry out a review of the FSA’s enforcement decisions in relation to HBOS.
2. The Terms of Reference set out the scope of the review.
3. This Protocol sets out the procedures under which the review is to be carried out. It has been agreed with the Regulators and shared with the Chairman of the Treasury Select Committee (“**the TSC**”).

B. Administrative Matters

4. Counsel has been given contacts at the FCA.
5. A dedicated email in-box for communications relating to Counsel’s review has been set up. Counsel should send his communications relating to the review to this in-box.
6. The FCA will arrange for Counsel and his team to be given reasonable access to the FCA’s premises in Canary Wharf.

C. Documents, other information and interviews

(1) Documents: requests and production

7. Counsel will send all requests for the production of documents by email to the email address referred to in clause 5 above. Such requests will set out the document or class of documents required for production.
8. Provided that the documents requested are within the Regulators’ power, custody or possession, such documents will be provided to Counsel (either on disc or in hard copy) as soon as possible. No such documents will be withheld from Counsel.

(2) General information requests and general explanations

9. In the event that Counsel requires other information and/or explanations as to the FSA's/FCA's enforcement activities, any such request will be sent by email to the email address referred to in clause 5 above.
10. The Regulators will respond as soon as possible to any such request, and no such information will be withheld from Counsel. The response will identify the person(s) who have provided the requested information and/or explanations.

(3) Interviews

11. In the event that Counsel wishes to carry out interviews with individuals, he will notify the Regulators (by email to the email address referred to in clause 5 above) of the individuals whom he wishes to interview.
12. The Regulators will endeavour to secure the attendance at interview of all such witnesses (whether those individuals are current or former employees of the Regulators). Interviews will be arranged at a mutually convenient time. Counsel will provide to the FCA, to allow the FCA to pass on to interviewees no less than 5 working days in advance, (i) a broad outline of the topics Counsel wishes to raise with the interviewee and (ii) a list of the principal documents which Counsel wishes to put to the interviewee.
13. The FCA will provide the facilities necessary for the carrying out of those interviews. In particular, it will provide a suitable room at its premises at North Colonnade or 1 Canada Square; and it will ensure that all interviews are recorded on dual recording equipment. It will also ensure that a transcript is prepared shortly after the interview, and provided on disc and in hard copy to Counsel, to the interviewee, to the PRA Review Team and to the FCA's GCD.
14. Interviewees may be accompanied by a legal adviser, Human Resources or other suitable representative.
15. The information obtained by reason of the interviews may be relied upon by Counsel in preparing his report.

D. Privilege & Confidentiality

(1) Privilege

16. Given the nature of enforcement decision-making, it will be necessary for Counsel to receive information which is subject to the FCA's legal privilege. The FCA will not withhold documents from Counsel on grounds of privilege, but the FCA is not thereby waiving privilege in the documents so provided to Counsel.

17. Counsel may refer to privileged documents in his report, but the Regulators will decide whether to redact parts of the report before it is subject to Maxwellisation or its publication on the basis that it refers to such privileged documents. If the Regulators decide to redact parts of the report on that basis, they will include in the Report of the overall review an explanation of the reasons for the redactions.

(2) Confidentiality

18. Counsel will be provided by the Regulators with “*confidential information*” within the meaning of section 348 FSMA. If so, when providing such information to Counsel, the Regulators will identify the fact that it is confidential. Counsel may refer to such confidential information in his report. It will be for the Regulators to seek to obtain the consent of the person from whom the information was received or, if different, the person to whom it relates. If such consent is not obtained, Counsel may nevertheless refer to such confidential information in the report and the Regulators will then decide whether to redact parts of the report before its publication on the basis that it refers to such information. If the Regulators decide to redact parts of the report on that basis, they will include in the Report of the overall review an explanation as to the reasons for the redactions.

E. Maxwellisation

19. Insofar as Counsel intends in his report to make criticism of individuals or organisations, (1) Counsel will identify those individuals or organisations, who will be given a reasonable opportunity to make representations in relation to such proposed criticisms and, having received any responses, (2) Counsel will consider those responses with an open mind prior to producing his report.

20. The Regulators, through the contacts listed in clause 4 above, (1) will assist Counsel (if so requested) in deciding which individuals or organisations should be given an opportunity to make such representations, and (2) will provide Counsel with such administrative assistance as is reasonably required by Counsel for the purpose of conducting this Maxwellisation process.

F. Publication

21. The Regulators will be responsible for publishing Counsel’s report, which will be published as part of the Report of the overall review. The final decision on publication will be made by the Regulators’ Boards (or a duly authorised committee of the relevant Board).

G. Governance and reporting

22. The Boards of the Regulators have appointed a joint Steering Group to oversee the production of the HBOS Report, including the report that Counsel is producing. If requested to do so, Counsel will keep the Steering Group informed as to the progress of the report. Counsel will on request provide pre-and post-Maxwellisation versions of his report to the Steering Group to assist it in addressing issues relating to matters such as legal privilege, information which is confidential under section 348 FSMA and those affecting the management of the regulators. The Steering Group will determine what, if any, further disclosure may be necessary, having regard to any conflicts of interests. Counsel will inform the TSC of any issues arising from contact with the Steering Group concerning the production of the report at all stages. Counsel will also inform the TSC if he considers that the pre-Maxwellisation version of the report is unlikely to be ready within the agreed timeframe.
23. For the purpose of preparing his report, Counsel may meet with the Independent Reviewers who have been appointed by the Regulators and the TSC to advise on the overall review.