

Regulator Assessment: Qualifying Regulatory Provisions

Title of proposal: PS17/1: Implementation of the Enforcement Review and HBOS Report

Lead regulator: FCA

Date of assessment: March 2017

Commencement date: 31 January and 1 March 2017

Origin: Domestic

Does this include implementation of a Cutting Red Tape review? No

Which areas of the UK will be affected? Whole of UK

Brief outline of proposed new or amended regulatory activity

The Decision Procedure and Penalties Manual (DEPP) sets out the FCA's decision-making procedures and our policies for various enforcement powers, including the imposition of sanctions. It fulfils our obligations under the Financial Services and Markets Act 2000 (the Act) to set out our policies and procedures in this area. DEPP forms part of the FCA Handbook.

The Enforcement Guide (EG) describes the FCA's approach to exercising the main enforcement powers given to us by the Act. We are not required by the Act to set out this information. The material in EG does not form part of the FCA Handbook.

In PS17/1, the FCA made changes to DEPP and EG in order to implement the recommendations made in the Treasury's Review of enforcement decision-making at the financial services regulators (HMT Review) and Andrew Green QC's Report into the FSA's enforcement actions following the failure of HBOS (HBOS Report), plus two internal proposals relating to enforcement action. Where these changes are qualifying regulatory provisions under the Enterprise Act we have conducted an impact assessment. These are set out below:

1. We are amending DEPP to include some non-exhaustive factors that the FCA would take into account when considering a request to extend time to respond to a Warning Notice, and amending the Enforcement Guide (EG) to reflect similar factors in considering a request to extend time to respond to a Preliminary Investigation Report.

2. We are amending EG to note the circumstances that we already normally take into account when considering a request to extend the stage 1 period. The stage 1 period is the period from commencement of an investigation until the FCA has a sufficient understanding of the nature and gravity of the breach to make a reasonable assessment of the appropriate penalty and has communicated that assessment to the person concerned and allowed a reasonable opportunity to reach agreement as to the amount of the penalty.

3. We are amending EG and DEPP to introduce a streamlined procedure to narrow the issues between the FCA and the subject by entering into a focused resolution agreement. The Regulatory Decisions Committee (RDC), the FCA's usual decision maker in contested disciplinary enforcement cases, would then determine the remainder of the outstanding issues including the appropriate regulatory response. The procedure sets out a framework for discounts to sanctions where a focused resolution agreement is agreed. This will provide more incentives for firms or individuals to narrow the dispute in contested cases without losing the chance of a 'fair crack of the whip' in relation to penalty.

We are also amending DEPP to signpost and extend the ability of subjects to waive the right to make representations on the FCA's case to the RDC, in order that they may proceed directly to the Upper Tribunal. There is no obligation for the subject to make representations but the Act generally requires the FCA to give statutory notices where we are proposing to exercise our regulatory enforcement powers. The RDC generally takes the decision to issue such notices in contested enforcement cases. The RDC will review the proposed warning notice and the evidence before coming to a decision and giving the subject a warning notice. Then the firm or individual may make representations to the RDC, after which the RDC may issue a decision notice. The firm or individual may refer that decision to the Upper Tribunal. If no representations are made within the time set out in the warning notice, the decision maker can regard the allegations or matters in that notice as undisputed and so proceed to issue a decision notice. This will be extended so that firms and individuals will now be able to indicate at an earlier stage that they will not wish to make representations and the change provides for a truncated procedure for the FCA giving a warning notice and decision notice.

Which type of business will be affected? How many are estimated to be affected?

An affected business will be one against which disciplinary enforcement action is brought by the FCA and which triggers the application of the various policies or provisions. We cannot reliably estimate the number of business which will trigger the application of the various policies or provisions, as outlined below with reference to each change. However we provide figures on open cases during the 2015/2016 financial year to give an indication of the number of cases against firms generally.

At 1 April 2015, the FCA had 226 open enforcement cases (excluding Threshold Conditions Team cases, which involve regulated firms that fail to meet that FCA's Threshold Conditions). Of these, 61 were against firms. Of these, 9 related to criminal or civil cases to which the changes referred to in the policy statement do not apply. Cases were at various stages of investigation at that date. During the financial year 2015/2016 we opened 109 cases, of which 41 were against firms (5 of which related to criminal or civil cases). The maximum number of cases against firms (excluding TCT cases) to have some steps taken (whether investigative or enforcement action) at any point during the year 15/16 was therefore 102 (88 excluding civil and criminal cases).

Price base year	Implementation date	Duration of policy (years)	Business Net Present Value	Net cost to business (EANDCB)	BIT score
2016	2017	10	0	0	0

Please set out the impact to business clearly with a breakdown of costs and benefits

The following section outlines the costs and benefits to firms as a result of the qualifying regulatory provisions outlined earlier. However, we have not been able to provide a quantification of these impacts. This is as we are unable to reliably estimate the number of firms impacted, as outlined above. In addition, at the time of the consultation being produced

there was no requirement to collect information from firms as to the potential costs or benefits of these changes. We do not consider it proportionate or reasonably practical to retrospectively collect data from firms on these costs or benefits, particularly as we are unable to reliably estimate the number of firms impacted.

Firms will generally review guidance on the enforcement process only if they become the subject of an investigation. The amendments alter or clarify the process rather than placing any obligations on firms. We therefore do not expect there to be familiarisation costs as a result of these amendments. Further, where the amendments provide clarification, we expect some cost savings to result.

1. We are amending DEPP to include some non-exhaustive factors that the FCA would take into account when considering a request to extend time to respond to a Warning Notice, and amending EG to reflect similar factors in considering a request to extend time to respond to a Preliminary Investigation Report.

This change will only affect firms who are the subject of an enforcement action who have received a warning notice or a document setting out the case team's preliminary findings and are considering requesting an extension of time in which to respond to those documents. Firms under investigation will read and interpret the following paragraph, which is additional to the material they would already have been reading and interpreting: :

"[The decision-maker] will take into account all relevant factors, including the legal and factual complexity of the case, and whether there are any factors outside the control of the firm or individual that would materially impact on their ability to respond within the period set out..."

As firms will generally review guidance on the enforcement process only if they become the subject of an investigation, we do not expect there to be any familiarisation costs from this amendment. Also the additional information provides clarification and does not impose any obligation on firms.

It may also mean that firms who are in the relevant situation and are considering requesting additional time in which to respond, may adapt the content of any request they make. Firms will benefit from having more information when taking a decision on whether and how to apply for an extension of time and will be able to take these decisions more effectively. This may materialise as savings in the time of key people within the firm if they are able to reach a decision more quickly than they may otherwise have done. Further if the change results in a decision not to make a request for an extension then the firm would not incur the cost associated with making such a request.

2. We are amending EG to note the circumstances that we already normally take into account when considering a request to extend the stage 1 period.

This change will only affect firms who are the subject of an enforcement action, are engaged in settlement discussions in the stage 1 period and are considering making a request to extend the period. It does not change the FCA's practice as the FCA already takes into account the circumstances listed. Firms under investigation will read and interpret the following paragraph, which is additional to the material they would already have been reading and interpreting:

"Factors that will be taken into account in considering an application will include the extent to which factors outside the firm's or individual's control will have a material impact on their ability to engage in settlement negotiations within the period set out in the stage 1 letter."

As firms will generally review guidance on the enforcement process if they become the subject of an investigation, we do not expect there to be any familiarisation costs from this

amendment. Also the additional information provides clarification and does not impose any obligation on firms.

It is conceivable that the publication of the factors may mean a firm decides not to make an application, which may afford a firm in that situation cost savings in relation to time and resources that would have been spent in making a request. This may include telephone conversations or written correspondence. In practice these points would likely have been discussed with the case team in the absence of the published details of circumstances, and so arguably the firm may have reached the same decision anyway.

Firms will however benefit from having more information when taking a decision on whether and how to apply for an extension of time and will be able to take these decisions more effectively. Taking a decision more effectively may reduce the cost to the firm in terms of time spent by people in the firm taking the decision.

3. We are amending EG and DEPP to introduce a streamlined procedure to narrow the issues between the FCA and the subject by entering into a focused resolution agreement. We are also amending DEPP to signpost and extend the ability of subjects to waive the right to make representations to the RDC, in order that they may proceed directly to the Tribunal.

The counterfactual to the changes with respect to streamlined procedures and the amendments to DEPP on extending the ability of subjects to waive rights to representations to the RDC are not observable. We cannot reliably estimate how many firms, who in the future are the subject of enforcement action, may choose to refer the action directly to the Upper Tribunal or partly resolve the action. Nor are we able to reliably estimate how many firms would otherwise have settled or have fully contested the action before the RDC.

Where a firm becomes the subject of an investigation, the process will be explained to them early in the investigation and they may wish to read documents explaining the process. They will now have to read different material to previously and therefore we do not expect familiarisation costs to increase in general. Where a firm is already familiar with the previous process, they will have to review the relevant documents or listen to explanations from the case team or the firm's own lawyers to become familiar with the changes. This will incur a cost in terms of time spent reading or listening to, and understanding, these changes. The amendments provide additional options to the firms but do not place any obligation on firms.

The FCA places no requirement on the subject of an investigation to resolve all or any part of a case, and the amendments to EG and DEPP do not change that. They merely allow part resolution of an enforcement action, which will give firms more opportunity to contest Enforcement's case without losing the benefits they receive through a discount to certain sanctions for settlement. This change is aimed at strengthening the transparency and effectiveness of the FCA's enforcement decision-making process. There is no requirement for firms to make use of this change and firms can still settle cases in full. The amendments also allow a subject to refer to the Tribunal at an earlier stage than previously.

If a firm does choose to contest part of a case where it considers it might otherwise have settled) then the firm will incur the cost in terms of the time and resources associated with contesting the case, which will vary depending on the amount of the case being contested. Where a firm would have otherwise fully contested a case and instead partly resolves it, narrowing the issues, the enforcement action is likely to take less time and fewer resources, representing a cost saving to the firm.

It has always been open to a firm to refer an action to the Tribunal rather than to contest this before the RDC. However the time at which a firm may do this has been brought forward by our changes. This may provide a benefit to a firm who was already planning to refer the case to the Tribunal, as they would not incur the costs of contesting the case in two different forums over a longer time period.

Please provide any additional information (if required) that may assist the RPC to validate the BIT Score.

At the time of the consultation being produced there was no requirement to collect information from firms as to the potential costs or benefits of the guidance. We do not consider it proportionate to retrospectively collect data from firms on costs.

References:

- The Treasury's 'Review of Enforcement Decision-making at the Financial Services Regulators' report in December 2014:

https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/389063/enforcement_review_response_final.pdf

- See the Enforcement Annual Performance Account for 2015/2016:

<https://www.fca.org.uk/enforcement-annual-performance-account-2015-16/14-enforcement-statistics>