



FCA enforcement annual roundup and looking ahead to 2018

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This article reviews the Financial Conduct Authority's approach to enforcement investigations in 2017 and highlights a few significant cases, identifying implications for enforcement in 2018.

The level of fines for the 2017-18 financial year is projected to be lower than in the 2016-17 financial year, which itself stands in stark contrast to the high level of fines in the previous few years. This should not however be viewed as indicating a softening of the FCA's willingness to impose high penalties for serious misconduct; the picture is more complex than these figures suggest.

The increase in the number of actions against individuals is consistent with a focus on individual responsibility, although there is a divergence between the number of actions and number of prohibitions, so that a smaller proportion of actions result in a prohibition. This could reflect a higher number of cases involving poor management or competence rather than being dominated by straight forward dishonesty issues.

FCA Enforcement Actions					
Financial year	Fines (€ million)	Number of fines	Actions against individuals	Prohibitions	
2011/12	76.4	59	85	47	
2012/13	423.2	51	55	45	
2013/14	425	46	28	25	
2014/15	1,409	43	41	26	
2015/16	884.6	34	55	24	
2016/17	181	15	80	23	
2017/18*	66.4 (88.5)	11 (15)	72 (96)	13 (17)	

*Figures based on final notices from April 1, 2017 to December 31, 2017. Figures in brackets indicate an estimate for the whole financial year based on figures to date.

Despite lower fines, 2017 was a busy year for the FCA's enforcement team. A change in approach to investigations means that the FCA has opened 75 percent more investigations than in the previous year (Mark Steward, September 2017).

Jamie Symington has explained: "We do not use investigations only as a precursor to contemplated enforcement action when something has gone wrong. But rather, investigation is a tool for finding out what has happened." (June 2017).

Viewed in this light, it is not surprising that there has been a large increase in investigations opened. Without an increase in enforcement resources at the FCA, there is a focus on determining key facts early in an investigation and closing more investigations without the imposition of a penalty. Changes to the FCA's settlement process in 2017 allow partial settlements to encourage subjects to narrow the issues in dispute, but it is too early to say how popular partial settlements will be.

In terms of the subject matter of enforcement actions, the FCA has sanctioned firms and individuals in respect of a range of issues. If there is any discernible trend, it is an emphasis on the effectiveness of systems and controls at financial institutions, even where no misconduct or detriment has occurred.

This trend can be seen in the enforcement actions for transaction reporting, announcements to the market and conflicts of interest, in addition to the FCA's stated focus on financial crime prevention and protecting vulnerable customers.

Market abuse and market conduct

Market abuse continues to feature amongst the enforcement outcomes.

The FCA continues to use its criminal prosecution powers in a handful of cases. For example, a former compliance officer and friend were charged with five counts of insider dealing and, separately, two others were sentenced for insider dealing.

A conviction is not necessarily the end of the story. In addition to a prohibition, the FCA will increasingly seek a confiscation order, as it did against a former trader convicted of insider dealing – Damian Clarke, July 2017.

The FCA fined a former bond trader, Paul Walter, just over £60,000 for giving a misleading impression in respect of his interest in Dutch government securities in 2014. The trader was an experienced professional, but the FCA found that he was negligent (rather than deliberate) and he was not aware that his conduct was market abuse.

The FCA considered the deliberate provision of misleading information to auditors and the market more serious in a case where the FCA would have imposed fines of £469,000 and £150,000 on the former CFO and financial controllers of a defunct spread betting company (Worldspread employees, April 2017). The fines were reduced to £12,000 and £105,000 (respectively) because of self-reporting, early settlement and a claim of serious financial hardship.

And, for the first time, a company has agreed to a compensation scheme under s384 FSMA for issuing misleading financial information (Tesco Stores and Tesco plc, March 2017). The FCA issued a public censure (but no financial penalty) while the companies agreed to remediation for investors.

Listing rule breaches

A number of listed companies have been sanctioned by the FCA for breaches of disclosure and transparency rules in 2017. A mining company was fined £27 million for failing to conduct an assessment of the impairment of the value of assets, which meant that financial reporting created a misleading impression for over five months (Rio Tinto, October 2017).

The FCA has used its powers under the Market Abuse Regulation for the first time to fine a self-managed closed ended investment fund £70,000 for failing to disclose the financial details of a transaction leading to market speculation for 13 days, when the details were announced (Tejoori Limited, December 2017).

Financial crime

The only significant enforcement action for financial crime (other than market conduct) relates to the familiar theme of anti-money laundering (AML) controls (Deutsche Bank, January 2017).

There were no findings of actual money laundering but the FCA imposed a penalty of £163 million for failing to have adequate AML controls in place.

The FCA raised specific concerns about customer due diligence and other controls in the booking of mirror trades through the London office with the aim of converting roubles to U.S. dollars and transferring funds to various other jurisdictions.

The FCA has also identified money laundering in capital markets beyond the scope of previous enforcement actions as an emerging risk that firms should be aware of (Megan Butler, December 2017).

The FCA's interest in firm's financial crime systems and control extends beyond AML. Firms can expect ongoing FCA interest in other financial crime prosecution, including sanctions, ABC and (particularly in the light of the entry into force of the new corporate offence) the facilitation of tax evasion.

Cybercrime has featured particularly in recent FCA speeches, if not in 2017 enforcement. IT resilience is viewed as important but the FCA also expects firms swiftly to report (under their Principle 11 obligations) material cyber-attacks, potentially including those that are successfully thwarted. Therefore, enforcement action related to a breach of Principle 11 are possible in relation to responses to cyber-attacks even if a firm has systems to deal with a cyber-attack.

Other systems and controls breaches

The FCA fined an insurance broker £4 million for a combination of communication and systems breaches. The broker held itself out as providing independent advice but, between 2011 and 2013, staff followed a business strategy of increasing business to the broker's parent insurer, which was not disclosed to customers ((Bluefin Insurance, December 2017)).

The FCA found that the systems in place were not sufficient to handle (and the firm's culture did not counter) the potential conflict of interest between the focus on favouring the parent company as an insurer over the best interests of customers.

A fine of £35 million for transaction reporting failings (Merrill Lynch, October 2017) is the latest in a series of enforcement actions on this theme.

On this occasion the firm was sanctioned for failing to report exchange traded derivatives under the European Market Infrastructure Regulation, but it is a timely reminder in the light of the additional transaction reporting obligations under MiFID II from this January.

The FCA has stated that it will take a proportionate approach to enforcement action for breach of MiFID II requirements. Firms making a genuine attempt to comply with MiFID II obligations in time and taking sufficient steps to do so should therefore not be unfairly penalised. However, the FCA views transactions reporting and reports of suspicious transactions and orders as important in its monitoring of markets, so this is likely to be an ongoing area of focus.

Retail products

The FCA's business plan for 2017/18 contained a commitment to focus on the protection of vulnerable consumers in particular, for example consumers in financial difficulty. There are examples of the FCA obtaining redress for consumers, sometimes without imposing an additional financial penalty.

One example involves a company providing hire purchase finance, which agreed to give redress of £14.8 million to customers in respect of approximately 249,000 agreements. The FCA found that the hire purchase lending may not have been affordable and certain payments should have been refunded (Brighthouse, October 2017).

In addition, a retail bank acknowledged that it did not always do enough to understand customers' circumstances when they fell into arrears to be confident that their arrears payment plans were affordable and sustainable. The bank therefore committed to refund certain fees charged to mortgage arrears customers (Lloyds Banking Group, July 2017).

The FCA has also obtained approximately £66 million redress for investors in a fund that provided short term bridging finance to the commercial property sector. The FCA found breaches of Principle 2 in the failure to conduct adequate due diligence before taking on the fund and to rectify any issues and breach of Principle 7 by failing to communicate fairly with investors (Capita Financial Management, November 2017).

Looking ahead

With Brexit and other demands on the FCA's resources, there are unlikely to be significant increases in resources for enforcement, but nevertheless the FCA is aiming to target serious misconduct in a range of areas. In the wholesale sector, targets will include insider dealing, misleading or delayed disclosure to the market and financial crime.

The first two are consistent with enforcement outcomes in 2017; the third has featured in statements, highlighting the importance of AML controls, the new offence of failure to prevent tax evasion and cybercrime.

Systems and controls are likely to feature again, with reporting of incidents, and reporting transactions and suspicious transactions under new obligations likely to be a focus.

In the retail sector, the FCA is likely to continue to select cases where it perceives consumer detriment and prioritise consumer redress.

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