
A better view of “A Better View”: What Steward’s speech tells us about the future of FCA investigations

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In a speech delivered earlier this year to the AFME European Compliance and Legal Conference¹, Mark Steward, Director of Enforcement and Market Oversight for the UK Financial Conduct Authority (“FCA”), addressed the agency’s enforcement record over the past year, and set the tone for its investigative intentions going forward.

In his speech, Steward reported an increase of approximately 75% in the number of investigations commenced by the FCA in the last year. He attributed this to three factors, the first being that the FCA has become increasingly confident – “*broadening [its] shoulders*” – in bringing actions relating to poor or misleading market disclosures. This included the first redress order under section 384 of the Financial Services and Markets Act against Tesco Ltd earlier this year. Estimates from the FCA at the time valued the likely total compensation payable by Tesco under the redress order at a sizeable £85 million, plus interest.

Secondly, Steward noted the “*richer and more varied market picture*” available to the FCA as a result of the extended reporting regime brought about by the Market Abuse Regime (“MAR”). According to Steward, this reporting, and in particular the increase in reporting around suspicious transactions, has led to an increase in the number of cases being selected for investigation.

Thirdly, and perhaps most interestingly, Steward credited the FCA’s increasing tally of open investigations to a “*change in approach when deciding whether to open an investigation*”, brought about in part by Andrew Green QC’s findings in his November 2015 report into the failure of HBOS².

By way of historical context, Andrew Green QC’s report concluded that the then Financial Services Authority’s (“FSA”) investigations into the failure of HBOS were unreasonable, in part because the FSA, “*when considering whether or not to conduct an investigation of an individual, would attempt to assess the likelihood of winning subsequent disciplinary proceedings against that individual*”³. In other words, although the statutory threshold for opening an investigation was – and remains – relatively low, the FSA had in mind the requirement to reach the higher evidential barrier of “*personal culpability*” in subsequent individual disciplinary proceedings, which had “*a tendency to discourage the FSA from starting investigations*” in the first place.

The FCA's "*change in approach*", in light of criticism from Andrew Green QC in relation to HBOS, was summarized by Steward as follows: "*we should investigate where we suspect serious misconduct may have occurred*". On the basis of this opaque mission statement, it is hard to distinguish exactly how this approach differs from what the FCA were – or at least claim they were – already doing before this change. Given the nature of the Andrew Green QC's criticism of the FSA, and the dramatic uptick in new investigations in the past twelve months, it seems likely that the "*change in approach*" could be more accurately summarized as follows: more investigations, opened earlier on, with an emphasis in particular on headline-grabbing "*serious misconduct*".

With a 75% increase in investigations in the past year, and the apparent promise that this trend will continue in the future, Steward pre-emptively addressed the obvious issue of how the FCA intends to resource its ever-increasing workload. His response to this question was somewhat unsatisfactory: Steward closed down any suggestion that the FCA either needs or is able to increase its resources, relying instead on the vague promise of becoming "*vastly more efficient, strategic and focused, especially in conducting investigations more quickly and expediently*". Steward gave his personal assurance that "*this can be done*". With no real sense of how such dramatic increases in expediency and efficiency will actually be achieved, and particularly with no commitment to staff increases, it is hard to share his confidence.

Notwithstanding its apparent successes over the past twelve months, with such an emphasis on quantity over quality in the FCA's docket of investigations, Steward may be promising more than he can realistically deliver. Certainly, a more timely approach to opening investigations may address the FCA's concern that "*the merits of a case cannot be assessed before you have the relevant evidence, or even the key evidence*". Steward is also at pains to emphasise that enforcement action is not an inevitable consequence of an investigation: "[w]hen we are investigating, we have not concluded any view about what has happened". However, in practical terms, it is difficult to see how a flurry of potentially hastily-opened, ill-considered, and under-staffed investigations will actually help the FCA achieve its goal of a more "*efficient, strategic and focused*" approach to enforcement.

¹ Mark Steward (20 September 2017), "*A Better View*". Available at <https://www.fca.org.uk/news/speeches/better-view>

² Andrew Green QC, assisted by James Segal and Simon Pritchard (November 2015), "*Report into the FSA's enforcement actions following the failure of HBOS*". Available at <http://www.bankofengland.co.uk/pra/Documents/publications/reports/agreenreport.pdf>

³ *Ibid.*, p. 87