Non-Confidential

Institute and Faculty of Actuaries

4 August 2023

Bank of England CP9/23 - Approach to Enforcement: Proposed Changes and Clarifications

IFoA Response

The Institute and Faculty of Actuaries (IFoA) is a royal chartered, not-for-profit, professional body. We represent and regulate over 32,000 actuaries worldwide and oversee their education at all stages of qualification and development throughout their careers.

1. The Institute and Faculty of Actuaries (IFoA) welcomes the opportunity to respond to the Bank of England's consultation paper on its proposed changes to its approach to enforcement. In particular, we welcome the clarifications to and consolidation of enforcement procedures within the Bank's/ PRA's proposed enforcement policies.

2. In developing our response to the consultation, we have drawn upon input from a range of IFoA members working in both life and general insurance.

3. It is important to note that, as for any IFoA response, we have considered the Bank's proposals from an independent, public interest perspective.

4. In our response below, we have answered a subset of the consultation questions, where we have a specific point to raise.

Question 1: Do you have any views on the PRA's proposals to introduce an Early Account Scheme and the enhanced settlement discount?

Early Account Scheme

5. As it may be difficult to know in advance whether an investigation might concern criminal matters, there may be merit in restricting the Early Account Scheme (EAS) to compel firms to share the underlying materials, e.g. documentation, data, calculations and meeting minutes. The accompanying detailed factual account could then be made optional.

6. In respect of these underlying materials, we support seeking an attestation by one or more independent senior managers over the completeness of the information provided. This would help to prevent the EAS being used to settle in respect of a lesser issue, before a greater issue might be uncovered.

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Enhanced Settlement Discount

7. The Enhanced Settlement Discount (ESD) has the potential to conserve scarce public resources to areas of true dispute and expediate enforcement matters, with a consequent early 'sign-posting' to others in the market as to acceptable or not acceptable behaviour.

8. However, care should be taken to avoid any unintended consequences of incentives provided in respect of earlier co-operation. If ESDs are too high, they may encourage early false admissions, simply to avoid the cost and reputational risk of contesting enforcement. A cost benefit analysis may warrant early false admission from the perspective of some stakeholders but to the detriment of other stakeholders. In the scenarios where enforcement is required, which may also be resolution scenarios for a firm or extreme operational risk events, such conflicts of interest between individuals could be mismanaged.

9. Therefore early admissions should themselves be investigated by the Bank and corroborated to ensure that these incentives do not result in additional false positive type I errors. The wrongful convictions of sub-postmasters of the Post Office based on the Horizon accounting system leading to avoidable detriment to individuals between 2000 and 2020 represents a relevant case study.

Question 2: Do you have any comments on the PRA's proposed changes to the penalty policy for firms?

10. The greater clarity over the approach taken to enforcement is welcome, particularly as it benefits those firms with strong governance structures in place that are unlikely to have experience of enforcement.

11. Fines for firms may be more effective since these will help incentivise the strong corporate governance and risk management that prevent individuals from being able to undertake actions that would warrant enforcement in the first place.

12. The burden of proof being used by the PRA should be specified, and in the case of penalties issued to firms, may be most appropriately aligned to civil proceedings i.e. on the balance of probabilities.

Question 3: Do you have any comments on the PRA's proposed changes to the penalty policy for individuals?

13. The specification of the Enforcement Decision Making Committee (EDMC) as the body which would, in practice, exercise the powers under section 345A of the FSMA is welcome. We agree that functional separation between the Bank's investigation teams and decision-makers is appropriate.

14. The burden of proof being used by the PRA should be specified, and in the case of penalties issued to individuals may be most appropriately aligned to criminal proceedings i.e. beyond reasonable doubt with an initial presumption of innocence.

15. With regard to Step 4 Deterrence, fines for individuals may be a blunt tool with which to ensure compliance, since there is an element of luck whereby an individual undertaking actions that would warrant enforcement may or may not go on to be fined. The severity of individual fines should be set at a level commensurate with the available evidence over whether such fines have any material deterrence effect that would prevent future crimes from taking place.

16. Failure of individuals represents an operational risk that may better be mitigated in advance through facilitating the work of second line risk functions, third line of defence internal and external auditors; and in the case of Solvency II Internal Models, independent validation teams.

Question 4: Do you have any comments on the PRA's proposed changes to the serious financial hardship thresholds for individuals?

17. Whilst the proposed updates to the financial hardship thresholds will allow for historic inflation, they could be future-proofed by linking explicitly the figures to the Office for National Statistics data that was used in their derivation.

Question 5: Do you have any comments on the Bank's proposed changes to the FMI Penalty Policy and the FMI Procedures, and Annex 2 of the new consolidated Bank Enforcement Approach?

We do not have any specific points to raise in response to this question.

Question 6: Do you have any other comments on the proposed changes to the current PRA Enforcement Approach Document and/or the introduction of the new consolidated Bank Enforcement Approach?

18. The streamlining of the Bank's documentation, and greater clarity in relation to Financial Market Infrastructure is welcome.

Question 7: Do you have any comments on the proposed new statement of policy relating to the PRA's allocation of decision-making and approach to supervisory decisions?

19. Greater clarity over how the EDMC would decide which materials to disclose to firms would be helpful, to ensure that firms are practically able to make representations. In most circumstances we would expect the Bank to allow a firm or individual access to the materials being relied upon, in order to provide clarity and nuance.

Question 8: Do you have any comments on the proposed changes to the EDMC member term limits?

20. We support the current EDMC member term limits, since the proposed changes may be inconsistent with the direction of travel on corporate governance issues such as regular rotation of audit partners, audit firms and non-executive directors.

Question 9: Do you have any comments on the proposed changes to the EDMC Procedures?

21. It is particularly important that there is diversity of thought in respect of the membership of the EDMC and sufficient technical expertise to ensure appropriate decisions can be made in respect of complex financial wrongdoing. Expert biographies of members should be published to demonstrate coverage across the EDMC's remit.

22. The size of the EDMC's membership should be high enough to allow members with a perceived conflict of interest to excuse themselves as may be appropriate.

Should you want to discuss any of the points raised please contact me, Steven Graham, Technical Policy Manager (steven.graham@actuaries.org.uk) in the first instance.

Yours Sincerely,

Steven Graham
On behalf of Institute and Faculty of Actuaries