Dear Andrew,

As part of the Banking Reform Bill debates one of the areas you have focussed on is a concern that regulators act ‘retrospectively’ – that is; apply a different standard or interpretation of the rules of the day with the benefit of hindsight than that which applied at the time that the poor conduct in question occurred. We also discussed this on our recent call where you highlighted PPI as an example of this in practice.

We do not apply different standards or interpret rules differently with hindsight. However, if this concern is widely expressed by industry in their discussions with you then I would entirely agree that this is not helpful for either firms or the regulators, nor is it the regulatory intent.

The requirement to only act against a reasonable interpretation of the rules and principles that were in force at the time mis-conduct occurred, taking into account the information reasonably available at the time decisions were taken, is hardwired into our formal rules and guidance. For example our published Enforcement Guide states:

"The FCA wishes to encourage firms to exercise judgement about, and take responsibility for, what the Principles mean for them in terms of how they conduct their business. But we also recognise the importance of an environment in which firms understand what is expected of them. So we have indicated that firms must be able reasonably to predict, at the time of the action concerned, whether the conduct would breach the Principles. This has sometimes been described as the "reasonable predictability test" or "condition of predictability", but it would be wrong to think of this as a legal test to be met in deciding whether there has been a breach of FCA rules. Rather, our intention has been to acknowledge that firms may comply with the Principles in different ways; and to indicate that the FCA will not take enforcement action unless it was possible to determine at the time that the relevant conduct fell short of our requirements.

To determine whether there has been a failure to comply with a Principle, the standards we will apply are those required by the Principles at the time the conduct took place. The
FCA will not apply later, higher standards to behaviour when deciding whether to take enforcement action for a breach of the Principles’

We have in place a rigorous internal assessment process to ensure that when taking a decision to refer a firm into enforcement we are clear on the basis for the referral. This assessment takes into account the factors set out in our Enforcement Guide.

The question of whether the regulator applies a different judgement in retrospect is not a new one. We have, through a number of channels including the independent Practitioner Panel, aimed to discover clear evidence from firms as to when this may have been the case; most recently in work we conducted on the perceived ‘expectations gap’.

Our Board continue to be focussed on this issue and most recently discussed the matter at their meeting of June 27. The Minutes of this discussion are public’, they reiterate our desire for firms to come forward and commit us to doing further work in this area.

In the first quarter of 2014 the FCA will report back on the work it has carried out on the perceived expectations gap between regulators and industry. At the same time it will announce a series of workstreams to take forward the findings of that work. This will include a consultation in the first half of 2014 where firms will be invited to provide feedback, including clear examples, of where industry believes the regulators have taken retrospective action. I also intend to give a speech covering this topic early next year to ensure it stays high on the agenda for industry and regulators and encourage more firms to be open and honest in their concerns. Personally, since we have become the FCA, I have found that firms have been more willing to share their concerns with us and would consider this to be the right model for the future.

I hope in total these measures demonstrate the FCA’s commitment to ensuring that we at all times act appropriately and within the framework laid down for us by Parliament, and the seriousness with which my senior management team and I are considering this concern.

Yours sincerely

Martin Wheatley
Chief Executive