

# FCA Enforcement: More Options for Resolution

The FCA has today announced significant changes to the enforcement decision making process which are likely to impact all enforcement cases, including those currently underway.

The FCA has today published a policy statement, following a consultation in 2016, detailing changes to its enforcement process. The key changes are:

- The introduction of a "focused resolution agreement" procedure, allowing subjects of investigation to settle some aspects of a case (e.g. certain facts or breaches) whilst disputing other aspects before the RDC and preserving up to a 30% discount on the proposed fine.
- The introduction of a mechanism for referring cases directly to the Tribunal, bypassing the RDC.

These key changes come into effect from 1 March 2017. Other less significant changes to the enforcement process, summarised below, take effect immediately.

The key changes are likely to have a significant impact on the way enforcement cases are handled by the FCA. In cases where the changes apply, they will materially alter the factors which those under investigation should take into account when considering whether or not to settle proposed disciplinary action.

If you would like to discuss these changes, please contact those listed at the end of this briefing.

## Focused Resolution Agreements ("FRA")

At present, settlement with the FCA is only available if agreement can be reached in respect of all aspects of the case: facts; applicable rules; breaches; and appropriate penalty.

With effect from 1 March 2017 it will be possible to enter into a partial settlement with the FCA through an FRA. This could cover some or all of the following matters:

- questions of fact;
- whether specified facts amount to a breach (or more than one breach);
- whether disciplinary action is warranted;

- the appropriate level of any financial penalty;
- whether action for a suspension, restriction, condition or limitation is warranted, and if so, the appropriate length of any suspension, restriction, condition or limitation;
- whether a prohibition order is warranted and, if so, its scope.

Aspects of the case not agreed in the FRA will be resolved by the RDC or by the Tribunal if the subject elects to use the expedited route to Tribunal described below.

A discount of up to 30% remains available depending on the scope of the FRA:

- 30% discount where agreement is reached on all aspects of the cases (including breaches) but not penalty;
- a discount in the range of 15% - 30% where agreement is reached on facts, but not on whether those facts amount to breaches or on the appropriate penalty;
- a discount in the range of 0% - 30% is available in all other cases.

The RDC will usually decide the appropriate discount when considering the case taking account of the extent to which the position taken by the subject of enforcement is reflected in its decision, and any savings in time and public resources achieved through the FRA.

The FCA is abolishing the 20% discount for Stage 2 (running until written responses to a Warning Notice) and the 10% discount for Stage 3 (from the end of Stage 3 until the issue of a Decision Notice).

## Expedited Route to Tribunal

At present, a referral to the Upper Tribunal only lies once the RDC has heard the case and issued a Decision Notice.

With effect from 1 March 2017 any subject of investigation will be entitled to bypass the RDC by giving notice to the FCA. Notice can be given either before or after a Warning Notice has been issued by the FCA.

### Other changes

Other less significant changes take immediate effect. These include changes to the Enforcement Guide providing that the FCA will:

- give greater clarity as to why a referral to Enforcement has been made;
- aim to give at least quarterly updates to the subject of the investigation;
- outline the likely timing of key milestones and next steps at scoping meetings;
- give greater involvement to senior managers in settlement discussions;
- aim to give 28 days' notice of the commencement of Stage 1 and, where appropriate, offer an early without prejudice discussion to allow the subject to identify errors in factual finding at an earlier stage.

### Commentary

The key change for firms is the introduction of FRAs.

It remains to be seen in how many cases the FCA will offer FRAs and what factors will influence their decision whether to do so.

At present the FCA has a very wide discretion in how it applies the five step process for determining the appropriate level of financial penalty. In some cases, in the opinion of some observers, FCA Enforcement has exercised this discretion to reverse engineer a pre-determined penalty figure (e.g. through the adjustment for deterrence).

Given that the FRA procedure allows the subject of an investigation to put a proposed penalty to the RDC or the Tribunal for scrutiny, whilst preserving a full 30% discount, it may be difficult for firms to justify not using the FRA procedure if it is available. Similar reasoning will apply where FCA Enforcement takes a challengeable stance on the scope of a Principle or Rule, as it has done in a number of recent settled cases.

For these reasons the impact of FRAs may well be a greater number of cases going to the RDC and/or the Tribunal. This would be in keeping with Mark Steward's

desire for a greater level of rigour in the reasoning set out in statutory notices.

The FCA proposes to make changes to its penalty policy later in 2017 which may affect how FRAs are used.

The expedited route to Tribunal is likely to be of interest chiefly to individuals who feel that they may not receive a sufficiently independent hearing before the RDC. But if the expedited route to Tribunal results in more cases against individuals being heard in the Tribunal more quickly, there may be an impact on parallel related enforcement proceedings (or indeed litigation) still ongoing against the firm.

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