**FCA: investigation, and enforcement, and challenging a decision**

This element considers the process of FCA investigation and enforcement including settlement, publicity and other potential consequences of an investigation.

**The FCA’s information gathering and investigation powers**

The FCA’s involvement in a matter is, broadly, separated into three stages. Each stage is presided over by different ‘bodies’. This ‘separation of powers’ is set out in section 395(2) FSMA 2000. In summary:

Stage 1: Investigation: (Undertaken by the relevant FCA investigation team, part of the ‘Enforcement Division’).

Stage 2: Enforcement proceedings: (Undertaken by the Regulatory Decisions Committee, an FCA committee that is appointed by, and accountable to, the FCA Board)

Stage 3: Challenging an FCA decision: (Upper Tribunal) (Tax and Chancery Chamber)

**Stage 1 – The Investigation**

- ‘Notice of Appointment of investigators’ sent to the firm

- FCA appoints an investigation team from the FCA’s ‘Enforcement Division’.

- Investigation team meets with the firm. Discussions include: FCA’s reasons for appointing investigators; the scope and process of the investigation; likely timing of the key milestones and next steps in the investigation; individuals and documents to which the investigation team will need to have access.

- The investigation team will then carry out the investigation, using a combination of informal and formal information gathering powers (see Information Request and investigation powers later in this element.)

- If FCA proposes to recommend enforcement action to the Regulatory Decision Committee (‘RDC’) then (1) legal review by a lawyer outside the investigation team to ensure a fair and consistent approach and sufficient evidence; and (2) usually a preliminary findings letter is sent to the firm or individual attaching a preliminary investigation report and inviting comment on the contents before referral to the RDC.

- Following the firm’s response: (1) the FCA may close its investigation; (2) the firm or individual may elect to settle the matter in full or in part; (3) the firm or individual may contest the case in full before the RDC (or request the expedited procedure for reference to the Upper Tribunal (Tax and Chancery Chamber)); (4) otherwise, the matter progresses to the FCA’s enforcement proceedings.

**Stage 2 - The Enforcement Proceedings**

Section 395(2) FSMA 2000 requires the FCA to ensure that the investigation team gathering evidence against a firm is separate from those issuing warning notices or decision notices. The Regulatory Decisions Committee (“RDC”) is responsible for the issue of these notices. The RDC is a Board Committee of the FCA that is appointed by, and accountable to, the FCA Board. The RDC has its own legal advisers and support staff who are separate from the FCA staff involved in conducting investigations and making recommendations to the RDC. Therefore:

- if the investigation team proposes that the FCA should exercise its enforcement powers, investigation team papers and the Investigation Report are submitted to the RDC.

- on contested issues, these papers include the firm’s or individual’s response to the investigation team’s preliminary findings in the matter.

- the RDC will review and decide whether or not to take the matter forward.

- if it decides to do so, a series of notices could be issued by the RDC depending on the nature of the action.

- the nature and details of these notices are summarised below.

**RDC notices**

Warning Notice, s. 387

This gives the firm details about action that the FCA proposes to take and about the right to make representations. The firm will have no less than 14 days to make representations to the FCA.

Decision Notice, s. 388

Following representations, the RDC FCA has a ‘reasonable time’ in which to decide whether to issue a decision notice (s. 387 FSMA 2000). A decision notice will give the reasons for the FCA’s decision in the enforcement action. A decision notice stands as the FCA’s decision subject to any successful challenge. (s. 387 FSMA 2000).

Final Notice, s. 390

If there is no appeal, a final notice will be issued. The FCA will publish such information as it considers appropriate on its website.

Supervisory Notice, s. 395(13)

The FCA issues a warning notice when it is proposing to take enforcement action. Unlike a warning notice, a supervisory notice can take effect immediately. A supervisory notice generally requires the firm to do (or refrain from doing) a particular activity. On this basis, it could vary the firm’s permission to undertake certain regulated activities.

Notice of Discontinuance, s. 389

The notice of discontinuance brings the disciplinary proceedings to a formal conclusion without any further action or disciplinary outcome.

**Stage 3- Challenging an FCA decision**

Appeals from decisions or notices issued by the Regulators are heard by the Upper Tribunal (Tax and Chancery Chamber) (the ‘Upper Tribunal’). The Upper Tribunal:

- was created by the Tribunals, Courts and Enforcement Act 2007.

- consists of specialist judges (some of whom also sit in the High Court) appointed by the Lord Chancellor and independent of the Regulators

- can, for example, refer the FCA’s decision to prohibit a firm from carrying on certain regulated activities back to the FCA for its reconsideration in light of the Tribunal’s own findings.

- is able to consider all the evidence and reach its own decision

- provides a possible means of recourse for firms or individuals who wish to challenge particular decisions taken by the Regulators

- hands down decisions that are binding on both the Regulators and the applicant

- is therefore one of the key checks on the Regulators’ actions under FSMA 2000.

Appeals against decisions of the Upper Tribunal can only be made with the permission of the Upper Tribunal or the Court of Appeal. Appeals to the Court of Appeal and subsequently to the Supreme Court are only possible on a point of law.

**FCA’s information-gathering powers**

The FCA has a broad range of powers to require firms and individuals to provide information. The FCA’s powers can be divided into the following categories:

- Informal information-gathering powers

- Powers to make formal requests for information

- Powers to initiate formal investigations

**Informal information-gathering powers**

(1) Principle 11 (2) Individual Conduct Rule 3 (3) Senior Management Conduct Rule 4

These require firms and individuals to co-operate with and assist the FCA. They are also supplemented by SUP 2.3 in the Handbook which deals with the following examples of FCA formal powers for information-gathering:

- request meetings/allow access to business premises during reasonable business hours

- give reasonable access to any records, tapes, files or computer systems within the firm’s possession or control and provide any facilities reasonably requested

- permit the copying of documents or other material on the firm’s premises at the firm’s reasonable expense and to remove copies and hold them elsewhere, or provide copies, as reasonably requested

- answer truthfully, fully and promptly all questions which are reasonably put to it by the FCA.

On rare occasions, the FCA may seek access to premises without notice. Indeed, the FCA can also apply to the court for a search warrant pursuant to section 176 FSMA 2000 (as referred to further below).

In essence, there is little that the FCA cannot ask of a firm

**Formal requests for information**

Two ‘formal’ information-gathering powers are available which allow the FCA to obtain information without initiating a formal investigation:

s. 165 – power to obtain information or documents by notice in writing - requires the firm to provide the information or documents specified in the request, to the extent that such information or documentation is reasonably required by the FCA in the exercise of its functions.

s. 166 – power to require a firm to commission a report by a skilled person - The person appointed to make the report is known as a ‘skilled person’. It could be an accountant, IT specialist, compliance consultant, lawyer or any other professional with relevant skills. They are appointed by the firm but must be nominated or approved by the FCA. The firm is required to pay the skilled person for the report and is required to provide all reasonable assistance to that person.

**Formal investigations**

FCA’s general investigation powers under sections 167 and 168 FSMA 2000:

- detailed scope of each section differs but broadly, the FCA can ask the firm to disclose almost any relevant information within its possession, however it has been recorded.

- this includes interviewing people and asking for explanations of documents.

Consequences of not complying with formal requests include:

- punishment as if in contempt of court - fine or (if serious) committal to prison.

- criminal offence may be committed where a person destroys documents or knowingly / recklessly provides false / misleading information in purported compliance with requirements imposed under FSMA 2000 (requirements re information gathering and investigations – ss. 177(3), 177(4), and 398 FSMA 2000 and ss. 89 to 95 Financial Services Act 2012).- other regulatory consequences for a firm either because its conduct amounts to a breach of Principle 11, or because the relevant conduct demonstrates that the firm or the individuals working there are not fit and proper, which could lead to wider regulatory repercussions

- in certain conditions the FCA may be able to obtain a warrant to enter the relevant premises and seize the material (section 176 FSMA 2000)

**Settlement discussions**

It is technically possible to settle with the FCA at any stage of its enforcement process. This may well be something that your client is interested in exploring and on which it seeks advice from you. The majority of large financial institutions would prefer to settle at an early stage. The implications for an individual’s career and livelihood mean than individuals are more likely to continue to challenge allegations for longer.

The following important points are to be borne in mind:

**- Settlement in a regulatory context**: unlike an ‘out of court’ settlement of a commercial dispute, the FCA serves a statutory function and has statutory obligations. Any settlement agreement therefore constitutes a ‘regulatory decision’ bringing the enforcement to an end and must comply with the FCA’s statutory objectives.

**- Notice**: if settlement is reached, it must be approved by the FCA adopting a regulatory decision and issuing the appropriate notice. Because a notice will need to be issued, any settlement will almost always result in some degree of publicity in the same way as an enforcement action that does not settle (unless the FCA settles for a private warning).

**- Publicity**: for the above reasons, one of the main aims of any person negotiating with the FCA will be to ensure that the wording of the final notice and any press release are as favourable to them as possible and do not contain/reflect findings that are too adverse. In contrast, commercial out of court settlements are often confidential.

**- Discount scheme**: any eventual financial penalty (or any period of suspension in respect of authorised activities) may be reduced by 30% if the firm being investigated reaches a settlement at an early stage of the FCA’s investigation.

- ‘**Settlement Decision Makers**’: Given its ‘separation of powers’, settlement discussions with the FCA are undertaken with specialist ‘Settlement Decision Makers’ who are drawn from a pool of senior FCA employees. The Settlement Decision Makers will be the ultimate decision makers in any settlement negotiations between Enforcement and a firm or individual. This means all settlement communications are made ‘without prejudice’ to the RDC. The RDC staff dealing with the enforcement action against the firm will not be a party to the settlement discussions.

**Publicity**

When it comes to publicity, the restrictions, obligations and limitations to which the FCA is subject under FSMA 2000 vary depending on which of the formal statutory notices is being published.

**- Warning Notice**: in most cases the FCA can print such information about the matter to which a warning notice relates as it considers appropriate, so long as it has consulted the firm first. The notice itself cannot be published- section 391(1) FSMA 2000.

**- Decision Notices and Final Notices**: the FCA ‘must publish such information about the matter to which the notice relates as it considers appropriate’ - section 391(4) FSMA 2000

**- FCA website**: though the FCA has a discretion as to how the information is actually publicised, in most cases, it will be by posting the relevant notice on the FCA website with an accompanying press release.

**- Limitations**: all the above are subject to 391(6) FSMA 2000 which states that the FCA may not publish information if, in its opinion, publication of the information would be:

unfair to the person with respect to whom the action was taken (or was proposed to be taken)

prejudicial to the interests of consumers

detrimental to the stability of the UK financial system.

The FCA’s ability to make a public announcement is also subject to s. 348 FSMA, which contains a general statutory prohibition preventing the FCA (and others) from disclosing confidential information relating to the business or affairs of any person obtained by it in the discharge of its functions under FSMA 2000.

**Consequences following an FCA investigation (1)**

FCA sanctions

The range of possible enforcement sanctions that the FCA can apply is wide:

- withdraw or vary a firm’s authorisation

- prohibit an individual from operating in financial services or undertaking specific regulated activities

- suspend a firm for up to 12 months from undertaking specific regulated activities

- suspend an individual for up to two years from undertaking specific controlled functions

- censure firms and individuals through public statements

- impose financial penalties (there is no maximum for financial penalties)

- seek injunctions

- apply to court to freeze assets

- seek restitution orders or

- prosecute firms and individuals who undertake regulated activities without authorisation.

In addition, you should bear in mind some other possible consequences of a regulatory breach which may include:

- Civil claims, for example, by customers, employees or market counterparties under general law (breach of contract, misrepresentation, negligence, breach of statutory duty or for equitable remedies)

- Civil claims under section 138D FSMA 2000 may be relevant. Contravention by an authorised person (ie a firm) of a rule (but not a Principle) is actionable for certain claimants if they have suffered loss. The precise details of this are beyond the scope of this module. However, a helpful indication of the way in which the courts will deal with claims under section 138D FSMA 2000 is provided by the following (non-examinable) cases, all of which are available via Westlaw

Rubenstein v HSBC Bank Plc [2012] EWCA Civ 1184

R. (on the application of British Bankers Association) v Financial Services Authority [2011] EWHC 999 (Admin)

Titan Steel Wheels Ltd v The Royal Bank of Scotland Plc [2010] EWHC 211

- Disciplinary or enforcement proceedings before other regulatory authorities, whether in the UK or overseas

- Consumer complaints being taken to the Financial Ombudsman Service (“FOS”) (http://www.financial-ombudsman.org.uk/).

**A word on the FOS**

In practice the possibility of consumer complaints being taken to the FOS needs to be carefully considered by firms who are or may be in breach of FCA Rules or Principles.

The details of the FOS regime and its procedures are set out in the DISP rules which forms part of the Redress Sourcebook in the Handbook. These are beyond the scope of the module. However, it is quite different to a civil claim in court:

- customers can only refer a matter to the FOS after they have made a complaint to the firm and are not satisfied with the outcome

- the FOS is free to consumers

- the FOS process and rules for consideration of customer complaints are not the same as court rules and the law

- for example, the FOS determines a complaint “by reference to what is, in his opinion fair and reasonable in all the circumstances of the case” (DISP 3.6.1)

- in considering what is fair and reasonable the FOS takes into (amongst other factors) account the relevant law and regulations but is not required to apply them.

As a result, complaints to the FOS (particularly if there is a group or class of complainants) can constitute a significant risk to a firm, even in the absence of court proceedings.

**Summary**

- The FCA’s involvement in a dispute is broadly split into three stages: investigation; enforcement proceedings; and appeal.

- If the investigation team proposes that the FCA should exercise its enforcement powers, the RDC considers the investigation team’s papers and any response from the firm and decides whether or not to take the matter forward.

- The RDC can issue a range of notices, including warning notices, decision notices and final notices.

- Following the decision notice by the regulator, the firm or individual has the right to refer the decision to the Upper Tribunal.

- The FCA has extensive information-gathering powers.

- Settlement discussions with the FCA are quite different to settlement discussions in most civil litigation due to the regulatory context of any such discussions.

- The FCA has a range of available sanctions, including withdrawing or varying a firm’s authorisation, prohibiting an individual from operating in specified areas and imposing a financial penalty.