



Enforcement (and how to avoid it!) Financial Services Series #2

This month's bulletin deals with the FCA's enforcement powers and process, aiming to provide a user-friendly overview and practical tips for the smooth management of the regulated firm's relationship with the FCA at each stage of the process.

In this month's bulletin, we:

- consider the FCA's enforcement powers;
- look at an overview of the FCA's enforcement process and how it operates in practice; and
- highlight key FCA sources of guidance and information.

What follows focuses on the prescribed enforcement process rather than on the FCA's power to prosecute or bring civil proceedings.

What enforcement powers does the FCA have?

The FCA has a wide variety of powers under the Financial Services and Markets Act 2000 (FSMA). These powers are meant to allow the FCA to take action against firms and individuals who are not meeting (or have not met) the standard expected from them by the FCA.

These powers include the ability for the FCA to:

- make public statements about firms and individuals,
- suspend firms from undertaking specific regulated activities for up to 12 months,
- suspend individuals from undertaking specific controlled functions for up to two years or prevent them from undertaking specific regulated activities,
- vary a firm's permission on its own initiative rather than in response to a request by the firm. This is known as own initiative variation of permission or "OIVOP" and is particularly used as a way to require actions that in the FCA's opinion would protect the interests of consumers or potential customers;
- impose financial penalties, and
- ultimately, withdraw firms' authorisations and prevent individuals from working in financial services.

In practice, how does the FCA's enforcement process work?

Under FSMA, the FCA is required to follow a set enforcement procedure. This procedure is set out in a flow chart in FCA guidance (details in the resources section below). The key stages, and practical tips for each stage, are as follows:

Pre-investigation – should you self-report, and if so who to?

If you become aware of a regulatory breach then you should think carefully about whether to self-report to the FCA. This will be a decision based on the circumstances and informed by the rules and guidance set out in SUP 15.3 and the Principles listed in PRIN 2.1, in particular Principle 11, which requires firms to deal with their regulator in an open and cooperative way. Consumer detriment is a key consideration and something the FCA takes extremely seriously so if the problem might be causing loss or damage to consumers it is likely that it will need to be reported.

Practical tips:

Tell all relevant teams - if you self-report an incident once you are already under investigation and it relates to the investigation it is safest to tell both your supervisory team and any investigator appointed by the enforcement team. Do not rely on the teams to tell one another.

Cooperate with the regulator – you are expected to deal with the regulator in an "open and cooperative" way. If you respond fully and promptly to questions and queries from the regulator and provide accurate information on any issues which have arisen which the regulator might reasonably want to know about it may be possible to avoid a full investigation.

Appointment of investigators

The FCA will notify you if investigators are appointed.

Practical tips:

Keep track of Notices of Appointment – this should allow you to know who your investigatory team is at any one time.

Scoping discussion

The scoping discussion is quite standardised but is likely to be the first formal meeting in the enforcement process.

Practical tips:

Attendees - consider who will be the FCA's key point of contact within the firm and make sure that person is part of the scoping discussion.

Investigation

The appointed investigators will progress the investigation. They may ask for documents or information and may interview the subject(s) of their investigation and any witnesses.

Practical tips:

Information request vs. mandatory requirement - If providing information voluntarily will cause you problems with, for example, client confidentiality, it may be worth explaining this and asking the FCA to exercise their powers to require information.

Privileged information - review whether any documentation is legally privileged and how it can be ring-fenced.

Subject or witness - It is important to understand whether your interviewees are themselves under investigation or whether they are being interviewed as witnesses only. As with information requests consider whether a compelled (rather than voluntary) interview should be sought and bear in mind that someone the FCA interviews as a witness now could later become a subject of the investigation.

Engage positively and proactively - discuss with the FCA whether fortnightly conference calls or regular meetings would help the firm and the regulator to order, prioritise and manage the issues relating to the investigation. Continual engagement will help the process run more smoothly and may assist in achieving a more favourable outcome.

Data format - if you are providing electronic data, check what form the FCA will be able to process in to avoid it being re-requested.

Information management - There may be numerous requests for information. It will be more efficient if one person is managing and taking ownership of all document requests from the FCA. This person will also be well placed to explain what searches have been undertaken at any one time which could be crucial if you need to discuss with the FCA why a particular request is not practical or possible.

Preliminary Investigation Report (PIR)

The FCA may send a PIR to the firm or individual. This does not always happen but can be a useful tool for settlement discussions.

Practical tips:

Settlement discount - the FCA offers discounts for earlier settlement. The PIR stage is a sensible time to think about settlement carefully.

Submission to the FCA Regulatory Decisions Committee (RDC)

If, following their investigation, the FCA thinks action is required they submit case papers to the RDC including an Investigation Report, which the RDC will consider.

Practical tips:

New review - the RDC is a subcommittee of the FCA and separate from the investigation. It will not know about any without prejudice discussions which have taken place.

Warning Notice

If the RDC decides it is appropriate it will send out a Warning Notice stating that the FCA intends to take further action. Since 15 October 2013 the FCA has had the ability to publish information about Warning Notices. Although not all Warning Notices will be publicised, unless there is a reason why it would be unfair to do so the presumption is in favour of publication. The FCA's statement is likely to contain the identity of the firm and enough information to enable consumers, firms and market users to understand the nature of the FCA's concerns. There will be consultation with the firm or person under investigation prior to publication.

Practical tips:

Disclosure - once a Warning Notice is issued the firm or individual has the right to access material relied on by the RDC in taking its decision, together with secondary material which might undermine that decision. Consider carefully what the FCA has provided to ensure that you have a full picture.

Representation to the RDC

After it receives the Warning Notice, the firm or individual has 14 days to make written or oral representations to the RDC. (Extra time can be applied for). The RDC will then meet again to consider the facts of the case, any representations and any new information.

Practical tips:

Additional time – if more than 14 days are needed to put together submissions, discuss this with the FCA as soon as possible giving reasons.

Decision Notice

The RDC makes its decision and may issue a Decision Notice. The firm or individual has 28 days to make a referral to the Upper Tribunal (Tax and Chancery Chamber).

Practical tips:

Independent hearing - the Tribunal is entirely independent of the FCA and will consider the entire case anew.

Public hearing - a Tribunal hearing is normally held in public.

Final Notice

If the case has not already been settled and no referral is made to the Tribunal following the Decision Notice, the FCA will issue a Final Notice.

If a case is settled at an earlier stage, this will be done by way of the issue of a Final Notice. It may be possible have some input into the terms of the Final Notice, particularly if settlement can be reached at an early stage of the proceedings.

Practical tips:

Publication - the FCA can publish information about a Decision Notice or Final Notice. It is usual for Final Notices to appear on the FCA's website.

Further Practical Information

This bulletin can only provide an overview. For further, more detailed information the FCA has published a number of potentially helpful resources:

Resource	Further details	Hyperlink
The FCA's enforcement information guide (brief guidance including process flowchart)	Published April 2013	http://www.fca.org.uk/static/documents/enforcement-information-guide.pdf
FCA Decision Procedure and Penalties Manual	Published 25 March 2013	http://fshandbook.info/FS/html/FCA/DEPP
FCA Enforcement Guide	Published 15 October 2013	http://media.fshandbook.info/Handbook/EG_FCA_20131015.pdf

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