RPC

Has the FCA made settling more appealing?

March 2017

Changes to the Regulatory Enforcement Process

Significant changes to the FCA enforcement process for firms and individuals under investigation came into force on 1 March 2017, following the release of a joint Policy Statement by the FCA and PRA in February 2017. These changes have been introduced following a review by HM Treasury and the Green Report, with the aim of improving the transparency and effectiveness of the regulators' enforcement processes.

The key changes introduced in the Policy Statement relate to:

- increasing the information provided to subjects at the start of an investigation to explain the reasons for launching the investigation and providing regular updates on its progress
- increasing the cooperation between FCA Supervisors and Enforcement investigators during investigations, through periodic meetings and knowledge sharing
- providing an expedited route to the Upper Tribunal by allowing parties to choose to leapfrog the Regulatory Decisions Committee (RDC)
- providing earlier notification of the beginning of stage 1 of the enforcement process and offering preliminary without prejudice settlement discussions
- introducing a new discounts regime for early settlement
- allowing parties to enter into partial settlements with the FCA.

Settlement discounts

The sliding scale of discounts available on settlement with the FCA (starting with a maximum discount of 30% of the financial penalty) has now been abolished. The discount is either 30% if settlement is reached during the early stage of the enforcement process (Stage 1), or nothing at all if settlement is reached later. The exception to this rule is if a partial settlement is reached during Stage 1 under the new regime, in which case a discount may still apply.

Any comments or queries?

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This proposal was criticised during the consultation process for putting increased pressure on subjects to settle up front and also penalising those that wish to test the FCA's case in front of the RDC after Stage 1. However, the FCA has introduced this measure nonetheless as it found that the sliding scale of discounts was rarely used in practice – the vast majority of cases tend to settle during Stage 1 or not at all. In parallel, the FCA is also implementing a new settlement process that aims to be more effective by:

- offering to meet subjects of enforcement actions earlier in the process and sharing the key factual and legal bases for the FCA's findings along with its key evidence, in order to allow parties to consider their position earlier and with more insight into the FCA's thinking
- allowing parties to enter into partial settlements for the first time.

Partial settlement

Under the previous regime, settlement of an enforcement action was an "all or nothing" deal. The FCA has now introduced a "middle ground" to allow subjects of an investigation to identify and settle parts of the FCA's case and to continue to dispute others. The partial settlement options now available to subjects of an investigation are:

- to agree all of the FCA's findings, but dispute the level of the penalty to be imposed
- to agree all of the relevant facts, but dispute that these facts give rise to the breaches alleged by the FCA or
- to agree one or more of the issues relevant to the enforcement action, but dispute other issues.

Representations can then be made to the RDC on the remaining issues and subjects will potentially still be able to obtain a discount of up to 30% on settlement thereafter, at the RDC's discretion. The size of the discount awarded by the RDC will depend on the terms of the partial settlement reached during Stage 1. Needless to say, the more issues that are settled during Stage 1, the higher the discount is likely to be, in recognition of the reduced time and costs incurred. Notably, if the only issue in dispute is the size of the penalty, the discount will remain at 30%; with the likely consequence that some parties, keen to settle the entire action, may now choose to push back on the penalty as they will have nothing to lose in this regard.

Conclusion

These changes intend to introduce an increased level of transparency to the enforcement process and a significant amount of flexibility to the FCA settlement process. However, inevitably with flexibility comes uncertainty. The clearly demarcated discount framework no longer applies and we are now in the unchartered waters of "discretionary discounts". While the introduction of the partial settlement framework has been welcomed by firms during the consultation process, it now remains to be seen how effective it will be in practice and, importantly, how the RDC will flex its new-found muscles in relation to awarding discretionary discounts.

RPC's Enforcement Regulatory team consists of four partners and counsel with first-hand experience of defending FCA Enforcement investigations and includes former FSA Enforcement lawyers and a legal advisor to the RDC.

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