Guidance for Insolvency Practitioners: Financial Conduct Authority's Update on Regulated Firm Restructurings and Insolvencies

October 5, 2022

On Thursday, 22 September 2022, the UK Financial Conduct Authority (FCA) held a webinar and Q&A session aimed at clarifying the FCA's expectations of office holders, lawyers and consultants navigating insolvencies and restructurings of regulated firms.

The overall message is that the FCA is dedicated to reducing harm from regulated firm failures and is focused on its statutory objectives of protecting consumers and the integrity of financial markets. It expects early and continued engagement as well as clear communications to consumers, and it intends to make greater use of its powers. We discuss key takeaways and remaining uncertainties below.

Key Points to Note

1. **FCA Powers.** The FCA has indicated it will be more assertive with its powers to mitigate harm caused by regulated firm failures. Increased intervention is to be expected. The FCA may act prior to a firm entering an insolvency process, in respect of compromises and/or during such processes. It may impose requirements (e.g., asset restrictions), vary regulatory permissions or apply to court to commence an insolvency process. Insolvency practitioners (IPs) should conduct due diligence as necessary to ensure their activities comply with any FCA restriction or, if a restriction conflicts with their duties, request the FCA to lift it (providing a reasonable explanation).

2. **Early Engagement.** The FCA expects early engagement when a regulated firm is in distress. It should be notified of decisions being considered and compromise proposals. It considers this crucial to avoid falling foul of regulatory requirements – obtain necessary approvals whilst avoiding delays and thereby achieve desired outcomes. An example of poor engagement is notifying the FCA of an out-of-court administration filing a day before the appointment or retrospectively: the regulator needs time to consider a proposal. The best practice is to engage the FCA at the strategy design stage (and certainly once an IP has been brought on board).

3. **Continued Dialogue.** A channel of communication with the FCA should be maintained. This was a consistent theme throughout the webinar. From an IP's appointment, regular contact – including frequent calls about options being considered – is a must, as are notifications that flow from decisions. Principle 11 requires that a firm must deal with its regulators in an open and cooperative way and disclose anything the FCA would reasonably expect notice of (including, for example, proposals for processes including a members' voluntary liquidation and restructuring plans that strictly do not require FCA consent).

4. **Customer Communications.** Protection of consumers is of paramount concern for the FCA. Transparency through communications with customers is necessary during an insolvency process. For example, a firm in administration should have online FAQs that pre-empt questions a customer may have. Not only does this provide clarity and assurance to customers, but in reducing the need to respond to individual queries, it also

brings down costs. The FCA has strict requirements with regard to all communications, including that information must be presented in a format consumers can understand. Prior to publication, practitioners can seek the FCA's views and must secure prior FCA approval where communications directly name the regulator. In a case we recently advised on, the FCA reviewed draft FAQs in detail and provided comments prior to publication (including to note that firms should not state that the FCA has provided its approval or indicate as such).

5. **Contingent Liabilities and Redress Claims.** Potential redress claims to consumers and contingent liabilities and the approach of IPs to the same are of great interest to the FCA. IPs should seek to identify the redress population (if any), communicate with affected consumers, treat customers fairly and provide them with an avenue to make a claim. In a case we are working on, we have experienced first-hand the FCA's involved approach to redress claims: the FCA has made detailed requests for information, including relevant consumer loan applications, details on approvals of loans and decision-making processes, and all communications in respect of the case.

6. **Contacting the FCA and Urgent Requests.** The email address for general enquiries and non-urgent consent requests is firm.queries@fca.org.uk. If FCA consent is needed urgently, an email to resolution@fca.org.uk should be sent with justifications for the urgency. The FCA has stated that this avenue should not be used unnecessarily and it is mindful of firms that 'cry wolf'.

7. **Regulatory Knowledge.** IPs of regulated firms must ensure they are familiar with the FCA's guidance (FG21/4). An IP should understand the regulated activities that the firm undertakes, its client base, rules and requirements applicable to it, and any potential compliance issues. IPs are expected to have the requisite knowledge and experience if they take an appointment over a regulated firm. Inexperience amounts to delay and extra costs, which ultimately affects the client firm and creditors.

Comment

Whilst the FCA's webinar was useful in providing greater clarity on the FCA's expectations and priorities, there remains a clear tension between the regulator's requirements on the one hand and legal requirements imposed on regulated firms and IPs appointed over them on the other. Notably, the FCA is focused on consumer protection. In the case of redress claims, the regulator has made clear its commitment to ensuring a remedy for consumers who received unaffordable loans. This focus of the FCA translates to a need for firms and IPs to also prioritise consumer interests to satisfy the regulator, yet they are equally obliged at law to consider the interests of all creditors in the round in an insolvency situation. We expect this tension to continue pending statutory intervention.

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