

FCA
GC22/1 Consultation team

By email only.

28 February 2022

Dear Sirs

Guidance consultation 22/1 – FCA’s approach to compromises for regulated firms

I refer to the above [consultation](#) issued in January and I am pleased to provide a response on behalf of The Institute of Chartered Accountants of Scotland (ICAS).

ICAS is the oldest professional body of accountants and represents over 23,000 members who advise and lead business across the UK and in over 100 countries across the world. ICAS is a Recognised Professional Body which regulates insolvency practitioners (IPs) who can take appointments throughout the UK. We have an in-depth knowledge and expertise of insolvency law and procedure.

ICAS’s Charter requires it to primarily act in the public interest, and our responses to consultations are therefore intended to place the public interest first. Our Charter also requires ICAS to represent its members’ views and protect their interests. On the rare occasion that these are at odds with the public interest, it is the public interest that must be paramount.

ICAS is not directly responding to the specific questions set out in the consultation but has instead made some general observations below:

1. The UK’s restructuring and insolvency framework is well developed and regarded as one of the leading regimes in the world. Where compromise arrangements are required (such as Schemes, Restructuring Plans and Voluntary Arrangements as set out in the consultation guidance) then these are carried out with the support and guidance of specialist insolvency and restructuring professionals. These professional advisers are almost invariably qualified as insolvency practitioners, accountants or from the legal profession.
2. We recognise that engagement with stakeholders is not only necessary but desirable for a successful compromise. It is helpful for significant stakeholders such as FCA to have clear guidance on how they will approach such matters and have clarity on information which they require to assess and engage in meaningful discussions.
3. Virtually all entities who would be likely to seek compromise arrangements will be governed by the Companies Act 2006 (the Companies Act) and the Insolvency Act 1986 (the Insolvency Act). The Companies Act and subsequent case law sets out the duties of Directors generally (section 172) and in situations where insolvency is likely where the directors fiduciary duties are to creditors. The draft guidance provisions provide some challenges to those tasked with governance of regulated entities when balancing the interests of the company, its wider creditors and the regulatory provisions set out in the guidance. We do not believe that the draft guidance sufficiently acknowledges the wider legislative provisions and challenges which regulated entities are required to consider when facing insolvency.
4. We acknowledge that there will always be competing and often diametrically opposed interests where an entity is in financial distress. Safeguards are however needed where significant stakeholders (such as FCA in the circumstances to which the guidance would apply) can exert undue influence, even where this is not intended. The tone of the guidance does not reflect that the FCA is only one potential stakeholder in what is likely to be a complex web.
5. With increased scrutiny of proposed compromises, there is likely to be increased costs not only in preparing information, but also professional and other associated costs involved in interaction and

possible negotiation with FCA. This could in some instances lead to compromises being considered as too costly or having undue risk attached to them for these options to be pursued and as a result leading to potential business failures that may have been otherwise avoidable. We would encourage that the draft guidance reflects that a proportional approach, taking into account all of the circumstances of the proposed compromise, should be taken with regard to information provision.

6. Paragraph 16 deals with further information for full assessment of a compromise to be provided at an early stage. This includes “Whether the firm will be setting up a creditors committee and how the committee will be set up and operate”. It is not entirely clear how this information will be available at an early point in the process as it will often be for the creditors to decide whether such a committee is set up. If a committee is formed it will operate in accordance with legislative provisions.
7. Paragraph 16 also indicates that firms should provide the FCA with an indication of 'any tax implications for creditors'. This seems an inappropriate role for a firm proposing a compromise to fulfil given the knowledge that would be required of each creditor's financial arrangements and which it cannot reasonably be expected for them to have.
8. Paragraph 28 states “When assessing a compromise proposed by a firm, we will take into account all of the information provided by the firm and consider a number of factors including but not limited to: a) whether the proposed compromise provides the best outcome possible for customers.....”. As has already been mentioned above, the directors' statutory duties in a distressed context are owed to a company's creditors as a whole. This therefore creates a tension for directors of FCA regulated firms between their statutory duties and the requirements of the FCA. In practice, the best outcome possible will usually depend on the attitude of third parties, such as shareholders or secured creditors, who are not subject to the FCA's regulatory control. Whether a compromise satisfies the regulatory objectives of the FCA is likely to depend on a judgement as to whether insolvency is the real alternative to the compromise being proposed rather than whether it is the best possible outcome for customers.
9. Paragraph 41 indicates that irrespective of whether a compromise is approved by the court, the FCA may use its regulatory powers to prevent a firm from implementing that compromise, notwithstanding any earlier participation and representations made in that court process. This seems to raise some questions surrounding the powers of the FCA to alter a court sanctioned arrangement and it is not clear how this would work in practice, when a compromise has been sanctioned and taken effect and so (for example) customer redress claims have been reduced as a matter of law. This again raises the prospect of uncertainty for regulated firms proposing a compromise and may again lead to decisions being taken which result in business failures which otherwise may have been avoidable.

I shall be pleased to provide any further information or clarification should this be of assistance.

Yours sincerely



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