

How can I successfully revoke a ban from the FCA?

By **Tom Bushnell**

Of all the sanctions the Financial Conduct Authority can impose on a financial adviser, the most damaging is probably the regulator's ability to exclude an individual from their chosen profession.

FCA bans (or as the regulator calls them, 'prohibition orders') prevent an individual from performing certain functions related to regulated activity. Their practical effect is usually to stop the person from working in the financial services sector.

Imposed by the FCA's regulatory decisions committee, prohibition orders can have devastating consequences and, as such, are much feared by financial services professionals.

But while bans have a reputation for ending careers, this need not necessarily be the case. In time, it is possible to vary (that is, limit) or even revoke entirely a validly made ban to enable the individual to return to work.

The law in this area is nuanced and complex, but two recent cases (one successful and one unsuccessful) indicate the parameters of a potentially successful application.

What are FCA prohibition orders?

The FCA's power to prohibit individuals is found in section 56 of the Financial Services and Markets Act 2000.

Under this provision, the agency can prohibit someone from "performing a specified function, any function falling within a specified description or any function".

This may relate to "a specified regulated activity, any regulated activity falling within a specified description or all regulated activities".

In practice, the FCA sometimes opts for what has become known as a 'total' prohibition, which prohibits the sanctioned individual from performing any function in relation to all regulated activity.

The FCA regularly imposes prohibition orders. At the time of writing, 563 individuals are listed on the Financial Services Register as prohibited. This list does not include individuals like Jes Staley, former Barclays chief executive, who have referred (that is, appealed) an FCA decision to prohibit them to the Upper Tribunal.

Section 56 of the FSMA 2000 does not explicitly provide for prohibition orders to be time limited. Because of this, prohibitions are open-ended and endure until the individual in question dies.

But the FCA can impose a time limit of sorts by indicating when it would be 'minded' to revoke the order, if asked to do so, and in the absence of new evidence that the individual is not fit and proper.

The agency rarely exercises this option. Indeed, this author is not aware of any example of the FCA doing this at all over the past five years

Banned individuals are instead left to work out themselves how long to wait until they go back to the FCA to ask for the order to be lifted or varied. How can an FCA prohibition order be altered or revoked?

Under section 58 of FSMA 2000 it is possible for a banned individual to apply to vary the terms of an FCA prohibition order or seek its revocation. This is different from appealing against the making of the order in the first place.

The FCA enjoys a wide discretion when considering such applications but is guided by its handbook, which states that the agency will "consider all the relevant circumstances".

These include matters such as:

- the seriousness of the misconduct or other unfitness that resulted in the order;
- the amount of time since the original order; and
- all available information relating to the individual's honesty, integrity or competence since the order was made.

Crucially, the handbook warns that the FCA will not generally grant an application unless:

1. the proposed variation will not result in a reoccurrence of the risk to consumers or confidence in the financial system that resulted in the order being made; and
2. the individual is fit to perform functions in relation to regulated activities generally or to those specific regulated activities in relation to which the individual has been prohibited.

If it is to be successful, any application to vary or revoke a ban must address the reoccurrence issue directly. The applicant must be able to show how their re-admission to the profession will not increase risk to consumers or risk to confidence in the financial system.

David King's unsuccessful attempt to vary his FCA ban

The case last year of former insurance company director David King is a useful one to consider when attempting to establish how to best vary or revoke an FCA prohibition order.

The FCA banned King from working in financial services following his convictions for theft, fraud and money laundering, for which he was sentenced to six years and four months in prison.

The criminal offences related to King having defrauded family members by taking their share of an inheritance. King was, at that time, an approved person at various authorised firms. The FCA imposed a total prohibition. It did not exercise its power to indicate when it might consider revoking the order.

In February 2022, seven months after his ban was first imposed and by which time he had been released from prison on licence, King applied for the order to be varied.

He wanted the prohibition order changed so he could pursue employment as a rural chartered surveyor (at an employer who engaged King advanced various arguments for why he should be permitted to work.

These included that he had been successfully rehabilitated (providing evidence of charitable work and character references); that any risk posed by him would be mitigated by the safeguards in place at his prospective employer; and (making a virtue of a particularly difficult aspect of his case) that he could still be recalled to prison for any suspected re-offending.

The FCA was unmoved and refused to interfere with the prohibition order. Its final notice reiterated the various aggravating factors in King's previous offending. It explained that it was unpersuaded that King's previous 'unfitness' had been remedied, saying that there had been insufficient "time and opportunity" for him to rehabilitate.

The lack of opportunity to rehabilitate or for King to prove his integrity is an interesting point. As the FCA's final notice states: "King has thus far been unable to provide sufficient evidence of having been in a role which gives rise to relevant opportunities for re-offending."

Similarly, the FCA criticised the fact that King's character references failed to "provide evidence of his conduct in situations where he was exposed to relevant opportunities for re-offending".

In other words, to successfully vary or revoke his ban, King must have been in a position where he could have been tempted to repeat his misconduct, but did not succumb.

Individuals in King's situation might feel aggrieved at the sense of circularity here. While the onus is firmly on the individual to prove their rehabilitation, how can people in this situation be expected to prove they no longer pose a risk to the public if they cannot get into a position to show this?

Arif Hussein's successful revocation of an FCA ban

While minimal details of the matter are in the public domain, the case of Arif Hussein shows it is possible to successfully overturn an FCA ban.

Hussein was a derivatives trader originally banned by the FCA in 2018 in relation to alleged manipulation of Libor interest rates.

Hussein appealed to the Upper Tribunal, which, while it disagreed with the FCA on the substance of the case and indicated that Hussein should not have been sanctioned for this conduct, found that he had failed to be candid with the FCA during the disciplinary process.

For this reason, the tribunal upheld the prohibition order. In doing so, however, it hinted that the FCA should exercise its power to indicate that it might be minded to revoke the order after a period of time. The FCA – at least in public – appears not to have done so.

in regulated insurance activities).

Then, on August 22 2023, precisely five years after the original prohibition order was made, it was revoked. The timing is unlikely to be coincidental.

Frustratingly for other individuals in the same position, the FCA has not published any statement or decision explaining why it reached this decision.

Instead, a single sentence in red text was added to the published prohibition order, telling the reader that the order had now been revoked; and the individual's entry on the Financial Services Register was updated to say that the FCA had "considered all the relevant circumstances of the case in reaching its decision".

Conclusion

The FCA is a powerful regulator with the resources (and institutional willingness) to impose what are effectively lifetime bans on individuals from working in the financial services industry.

The effect of these prohibitions is almost always extremely serious for the individual, harming their employment prospects, financial position and reputation.

But because of the seriousness of any ban, the use of the power must be tempered by proportionality.

One way for this would be for the regulator to more readily give an indication as to the minimum length of a prohibition, or when individuals could re-apply. Doing this would not tie the FCA's hands in the future, but it would give the individual involved (and those who might employ them) a sense of the timescales involved.

It would also be to everyone's benefit for the FCA to give greater guidance as to what factors it will consider when determining such applications, and what factors have persuaded it to lift bans on the occasions that it has.

In the absence of this information, we are left to parse relatively limited examples for clues as to what the FCA should consider.

From this, four themes emerge:

1. that the evidential onus is on the applicant;
2. that they face an uphill battle;
3. that they must obtain suitable experience without falling foul of their prohibition and despite of the existence of it; and
4. that revoking a ban is indeed possible.

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