

Chapter 2

The FCA's approach to enforcement

2.2 Case selection and referral criteria

2.2.1 [deleted]■ EG 2.3.1

2.2.2 The *FCA* does not have a set of enforcement priorities that are distinct from the priorities of the *FCA* as a whole. Rather, the *FCA* consciously uses the enforcement tool to deliver its overall strategic priorities. The areas and issues which the *FCA* as an organisation regards as priorities at any particular time are therefore key in determining at a strategic level how enforcement resource should be allocated. *FCA* priorities will influence the use of resources in its supervisory work and as such, make it more likely that the *FCA* will identify possible breaches in these priority areas. Further, should evidence emerge of potential breaches, these areas are more likely to be supported by enforcement action than non-priority areas.

2.2.3 One way in which the *FCA* focuses on priority areas is through its thematic work. This work involves the *FCA* looking at a particular issue or set of issues across a sample of *firms*. Themes are, in general, selected to enable the *FCA* to improve its understanding of particular industry areas or to assess the validity of concerns the *FCA* has about risks those areas may present to the *statutory objectives*. Thematic work does not start with the presumption that it will ultimately lead to enforcement outcomes. But if the *FCA* finds significant issues, these may become the subject of enforcement investigations as they would if the *FCA* had discovered them in any other circumstance. Also, by definition, the fact they are in areas that are of importance to the *FCA* means, following the *FCA*'s risk-based approach through, that they are proportionately more likely to result in the *FCA* determining that an enforcement investigation should be carried out than issues in lower priority areas.

2.2.4 This does not mean that the *FCA* will only take enforcement action in priority strategic areas. There will always be particularly serious cases where enforcement action is necessary, ad hoc cases of particular significance in a markets, *consumer* protection or *financial crime* context, or cases that the *FCA* thinks are necessary to achieve effective deterrence.

2.2.5 The combination of the priority given to certain types of misconduct over others and the *FCA*'s risk-based approach to enforcement means that certain cases will be subject to enforcement action and others not, even where they may be similar in nature or impact. The *FCA*'s choice as to the use of the enforcement tool is therefore a question of how the *FCA* uses its resources effectively and efficiently and how it ensures that it is an effective regulator.

2.2.6 In all cases, before it proceeds with an investigation, the *FCA* will satisfy itself that there are grounds to investigate under the statutory provisions that give the *FCA* powers to appoint investigators. Another consideration will be whether the *FCA* has any agreements in place regarding taking action on behalf of, or otherwise providing assistance to, other authorities. ■ EG 2.5.1 discusses the position where other authorities may have an interest in a case. If the statutory test is met, the *FCA* will consider what is the most efficient and effective way of achieving its statutory objectives of protecting consumers, enhancing market integrity and promoting competition. A referral to Enforcement for an investigation will be made if the *FCA* considers that an investigation, rather than an alternative regulatory response, is the right course of action given all the circumstances. Enforcement action and other regulatory tools can be used together and are not mutually exclusive. To assist in making the decision to refer a matter for investigation, the *FCA* has developed referral criteria that set out a range of factors it may consider when deciding whether to appoint enforcement investigators. The criteria are not exhaustive, and all the circumstances of a particular case are taken into account. Not all the criteria will be relevant to every case, and additional considerations may apply in certain cases. Any one of the factors alone may warrant the appointment of investigators and in some cases, including cases where *breaches* are self-reported, the misconduct may be so serious that there is no credible alternative to referral.

2.2.7 If a decision to refer an *individual* or *firm* to Enforcement is made, the *FCA* will explain and set out the criteria applied in coming to the decision to refer, and will give a summary of the circumstances and the reason(s) for the referral at the start of the investigation.

Case selection: disciplinary regulatory cases

2.2.8 The *FCA*'s referral criteria are published on the Enforcement section of the *FCA*'s website: <http://www.fca.org.uk/about/enforcement/referral-criteria>. In considering whether an enforcement investigation is likely to further the *FCA*'s aims and objectives, the *FCA* will consider factors that address the following issues:

- (1) any available supporting evidence and the proportionality and impact of opening an investigation;
- (2) what purpose or goal would be served if the *FCA* were to end up taking enforcement action in the case; and
- (3) relevant factors to assess whether the purposes of enforcement action are likely to be met.

Case selection: markets cases

2.2.9 In relation to non-criminal *market abuse* investigations, the revised referral criteria will be similarly applied in deciding whether to open such an investigation. However, given the often limited alternatives to enforcement action available to address *market abuse* (with many of the subjects typically unauthorised), greater emphasis will be given to the egregiousness and deterrence value of a particular case when making such decisions.

2.2.10

Case selection: listing cases

As with *market abuse* cases, many of the non-enforcement tools are not available for use in cases involving listing regime *breaches*. This is because in many cases (aside from certain areas such as *sponsors* and *primary information providers*), there will be no on-going supervisory relationship with the listed companies in question, and no similar authorisation regime as there is with *authorised persons, firms* and *individuals*. As a result, the ability to use many of the early intervention tools or restricting or limiting certain activities is not available and enforcement is likely to be the most effective (and sometimes only) regulatory tool available to address the misconduct.