

Appendix 2

Appendix 2 - Guidelines on investigation of cases of interest or concern to the Financial Conduct Authority and other prosecuting and investigating agencies

2.1 Purpose, status and application of the guidelines

- App2.1.1** These guidelines concern the following bodies (the agencies):
- the Financial Conduct Authority (the *FCA*);
 - the Serious Fraud Office (the *SFO*);
 - the Department for Business, Innovation and Skills (*BIS*);
 - the Crown Prosecution Service (the *CPS*);
 - the Association of Chief Police Officers in England, Wales and Northern Ireland (*ACPO*);
 - the Crown Office and Procurator Fiscal Service (*COPFS*);
 - the Public Prosecution Service for Northern Ireland (the *PPS*);
 - the Association of Chief Police Officers in Scotland (*ACPO*).
- App2.1.2** The guidelines are intended to assist the agencies when considering cases concerning financial crime and/or regulatory misconduct that are, or may be, of mutual interest to the *FCA* and one or more of the other agencies. Their implementation and wider points arising from them will be kept under review by the agencies who will liaise regularly.
- App2.1.3** The purpose of the guidelines is to set out some broad principles which the agencies agree should be applied by them in order to assist them to:
- (a) decide which of them should investigate such cases;
 - (b) co-operate with each other, particularly in cases where more than one agency is investigating;

- (c) prevent undue duplication of effort by reason of the involvement of more than one agency;
- (d) prevent the subjects of the proceedings being treated unfairly by reason of the unwarranted involvement of more than one agency.

App2.1.4 The guidelines are intended to apply to the relationships between the *FCA* and the other agencies. They are not intended to apply to the relationships between those other agencies themselves where there is no *FCA* interest. They are not legally binding.

App2.1.5 The guidelines are subject to the restrictions on disclosure of information held by the agencies. They are not intended to override them.

App2.1.6 The guidelines are relevant to ACPO and ACPO(S) only in so far as they relate to investigations. Similarly, they are relevant to the CPS, COPFS and the PPS only in so far as they relate to prosecutions.

Commencing Investigations

App2.1.7 The agencies recognise that there are areas in which they have an overlapping remit in terms of their functions and powers (the powers and functions of the agencies are set out in the Appendix to this document). The agencies will therefore endeavour to ensure that only the agency or agencies with the most appropriate functions and powers will commence investigations.

App2.1.8 The agencies further recognise that in certain cases concurrent investigations may be the most quick, effective and efficient way for some cases to be dealt with. However, if an agency is considering commencing an investigation and another agency is already carrying on a related investigation or proceedings or is otherwise likely to have an interest in that investigation, best practice is for the agencies concerned to liaise and discuss which agency or agencies should take action, i.e. investigate, bring proceedings or otherwise deal with the matter.

Indicators for deciding which agency should take action

App2.1.9 The following are indicators of whether action by the *FCA* or one of the other agencies is more appropriate. They are not listed in any particular order or ranked according to priority. No single feature of the case should be considered in isolation, but rather the whole case should be considered in the round.

- (a) Tending towards action by the *FCA*
Where the suspected conduct in question gives rise to concerns regarding market confidence or protection of consumers of services regulated by the *FCA*. Where the suspected conduct in question would be best dealt with by:
criminal prosecution of offences which the *FCA* has powers to prosecute by virtue of the Financial Services and Markets Act 2000 ("the 2000 Act") (See Appendix paragraph 1.4) and other incidental offences;
civil proceedings under the 2000 Act (including applications for injunctions, restitution and to wind up firms carrying on regulated activities);
regulatory action which can be referred to the *Tribunal* (including proceedings for market abuse); and

proceedings for breaches of the *Prospectus Regulation* actionable under *Part VI* of the *Act*, of *Part 6 rules* or the *Prospectus Rules*.

Where the likely defendants are *authorised persons*, *approved persons* or *conduct rules staff*.

Where the likely defendants are issuers or sponsors of a security admitted to the official list or in relation to which an application for listing has been made. Where there is likely to be a case for the use of *FCA* powers which may take immediate effect (e.g. powers to vary the permission of an authorised firm or to suspend listing of securities).

Where it is likely that the investigator will be seeking assistance from overseas regulatory authorities with functions equivalent to those of the *FCA*.

Where any possible criminal offences are technical or in a grey area whereas regulatory contraventions are clearly indicated.

Where the balance of public interest is in achieving reparation for victims and prosecution is likely to damage the prospects of this.

Where there are distinct parts of the case which are best investigated with regulatory expertise.

(b) Tending towards action by one of the other agencies

Where serious or complex fraud is the predominant issue in the conduct in question (normally appropriate for the SFO).

Where the suspected conduct in question would be best dealt with by: criminal proceedings for which the *FCA* is not the statutory prosecutor; proceedings for disqualification of directors under the *Company Directors Disqualification Act 1986* (normally appropriate for BIS action); winding up proceedings which the *FCA* does not have statutory powers to bring (normally appropriate for BIS action); or criminal proceedings in Scotland.

Where the conduct in question concerns the abuse of limited liability status under the *Companies Acts* (normally appropriate for BERR action).

Where powers of arrest are likely to be necessary.

Where it is likely that the investigator will rely on overseas organisations (such as law enforcement agencies) with which the other agencies have liaison.

Where action by the *FCA* is likely to prejudice the public interest in the prosecution of offences for which the *FCA* is not a statutory prosecutor

Where the case falls only partly within the regulated area (or criminal offences for which *FCA* is a statutory prosecutor) and the prospects of splitting the investigation are not good.

App2.1.10

It is also best practice for the agencies involved or interested in an investigation to continue to liaise as appropriate throughout in order to keep under review the decisions as to who should investigate or bring proceedings. This is particularly so where there are material developments in the investigation that might cause the agencies to reconsider its general purpose or scope and whether additional investigation by others is called for.

Conduct of concurrent investigations

App2.1.11

The agencies recognise that where concurrent investigations are taking place, action taken by one agency can prejudice the investigation or subsequent proceedings brought by another agency. Consequently, it is best practice for the agencies involved in concurrent investigations to notify each other of significant developments in their investigations and of any significant steps they propose to take in the case, such as:

- interviewing a key witness;
- requiring provision of significant volumes of documents;

executing a search warrant; or instituting proceedings or otherwise disposing of a matter.

App2.1.12 If the agencies identify that particular action by one party might prejudice an investigation or future proceedings by another, it is desirable for the parties concerned to discuss and decide what action should be taken and by whom. In reaching these decisions, they will bear in mind how the public interest is best served overall. The examples provided in ■ App 2.1.9 above may also be used as indicators of where the overall balance of interest lies.

Deciding to bring proceedings

App2.1.13 The agencies will consider, as necessary, and keep under review whether an investigation has reached the point where it is appropriate to commence proceedings. Where agencies are deciding whether to institute criminal proceedings, they will have regard to the usual codes or guidance relevant to that decision. For example, agencies other than the PPS or COPFS will have regard to the Code for Crown Prosecutors (Note: Different guidance applies to the PPS and COPFS. All criminal proceedings in Scotland are the responsibility of the Lord Advocate. Separate arrangements have been agreed between the FCA and the Crown Office for the prosecution of offences in Scotland arising out of FCA investigations). Where they are considering whether to bring non-criminal proceedings, they will take into account whatever factors they consider relevant (for example, in the case of market abuse proceedings brought by the FCA, these are set out in ■ paragraph 6.2 of the FCA Decision and Procedure and Penalties manual).

App2.1.14 The agencies recognise that in taking a decision whether to commence proceedings, relevant factors will include:

- whether commencement of proceedings might prejudice ongoing or potential investigations or proceedings brought by other agencies; and
- whether, in the light of any proceedings being brought by another party, it is appropriate to commence separate proceedings against the person under investigation.

App2.1.15 Best practice in these circumstances, therefore, is for the parties concerned to liaise before a decision is taken.

Closing Cases

App2.1.16 It is best practice for the agencies, at the conclusion of any investigation where it is decided that no further action need be taken, or at the conclusion of proceedings, to notify any other agencies concerned of the outcome of the investigation and/or proceedings and to provide any other helpful feedback.