

Chapter 2

The FCA's approach to enforcement

2.1 Case selection and the use of enforcement powers

2.1.1 The *FCA's* effective and proportionate use of its enforcement powers plays an important role in the pursuit of its *statutory objectives*, including its operational objectives of securing an appropriate degree of protection for *consumers*, protecting and enhancing the integrity of the *UK financial system*, and promoting effective competition in the interests of consumers. For example, using enforcement helps to contribute to the protection of *consumers* and to deter future contraventions of *FCA* and other applicable requirements and *financial crime*. It can also be a particularly effective way, through publication of enforcement outcomes, of raising awareness of regulatory standards.

2.1.2 There are a number of principles underlying the *FCA's* approach to the exercise of its enforcement powers:

- (1) The effectiveness of the regulatory regime depends to a significant extent on maintaining an open and co-operative relationship between the *FCA* and those it regulates.
- (2) The *FCA* will seek to exercise its enforcement powers in a manner that is transparent, proportionate, responsive to the issue, and consistent with its publicly stated policies.
- (3) The *FCA* will seek to ensure fair treatment when exercising its enforcement powers.
- (4) The *FCA* will aim to change the behaviour of the *person* who is the subject of its action, to deter future non-compliance by others, to eliminate any financial gain or benefit from non-compliance, and where appropriate, to remedy the harm caused by the non-compliance.

2.1.3 Enforcement is only one of a number of regulatory tools available to the *FCA*. As a risk based regulator with limited resources, throughout its work the *FCA* prioritises its resources in the areas which pose the biggest threat to its *statutory objectives*. This applies as much to the enforcement tool as it does to any other tool available to it. The next section of this chapter summarises how in practice the *FCA* takes a risk based approach towards its use of the enforcement tool, and the subsequent sections comment on other aspects of the *FCA's* approach to enforcement.

2.1.4

Where a *firm* or other *person* has failed to comply with the requirements of the *Act*, the *rules*, or other relevant legislation, it may be appropriate to deal with this without the need for formal disciplinary or other enforcement action. The proactive supervision and monitoring of *firms*, and an open and cooperative relationship between *firms* and their supervisors, will, in some cases where a contravention has taken place, lead the *FCA* to decide against taking formal disciplinary action. However, in those cases, the *FCA* will expect the *firm* to act promptly in taking the necessary remedial action agreed with its supervisors to deal with the *FCA's* concerns. If the *firm* does not do this, the *FCA* may take disciplinary or other enforcement action in respect of the original contravention.

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 is under a Community obligation to take action on behalf of, or otherwise to provide assistance to, an authority from another EU member state. ■ 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.

Case selection: listing cases

2.2.10

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.



2.3 Case selection: Threshold Conditions cases

2.3.1

The *FCA* often takes a different approach to that described above where *firms* no longer meet the *threshold conditions*. The *FCA* views the *threshold conditions* as being fundamental requirements for *authorisation* and it will generally take action in all such cases which come to its attention and which cannot be resolved through the use of supervisory tools. The *FCA* does not generally appoint investigators in such cases. Instead, *firms* are first given an opportunity to correct the failure. If the *firm* does not take the necessary remedial action, the *FCA* will consider whether its *permission* to carry out regulated business should be varied and/or cancelled. However, there may be cases where the *FCA* considers that a formal investigation into a *threshold conditions* concern is appropriate.

2.4 Case selection: Unauthorised business

2.4.1 Where this poses a significant risk to the *consumer* protection objective or to the *FCA's* other *regulatory objectives*, *unauthorised* activity will be a matter of serious concern for the *FCA*. The *FCA* deals with cases of suspected *unauthorised* activity in a number of ways and it will not use its investigation powers and/or take enforcement action in every single instance.

2.4.2 The *FCA's* primary aim in using its investigation and enforcement powers in the context of suspected *unauthorised* activities is to protect the interests of *consumers*. The *FCA's* priority will be to confirm whether or not a *regulated activity* has been carried on in the United Kingdom by someone without *authorisation* or exemption, and, if so, the extent of that activity and whether other related contraventions have occurred. It will seek to assess the risk to *consumers'* assets and interests arising from the activity as soon as possible.

2.4.3 The *FCA* will assess on a case-by-case basis whether to carry out a formal investigation, after considering all the available information. Factors it will take into account include:

- (1) the elements of the suspected contravention or breach;
- (2) whether the *FCA* considers that the *persons* concerned are willing to co-operate with it;
- (3) whether obligations of confidentiality inhibit individuals from providing information unless the *FCA* compels them to do so by using its formal powers;
- (4) whether the *person* concerned has offered to undertake or undertaken remedial action.



2.5 Cases where other authorities have an interest

2.5.1

Action before or following an investigation may include, for example, referring some issues or information to other authorities for consideration, including where another authority appears to be better placed to take action. For example, when considering whether to use its powers to conduct formal investigations into market misconduct, the *FCA* will take into account whether another regulatory authority is in a position to investigate and deal with the matters of concern (as far as a *recognised investment exchange* or *recognised clearing house* is concerned, the *FCA* will consider the extent to which the relevant exchange or clearing house has adequate and appropriate powers to investigate and deal with a matter itself). Equally, in some cases, the *FCA* may investigate and/or take action in parallel with another domestic or international authority. This topic is discussed further in ■ DEPP 6.2.19 G to ■ DEPP 6.2.28 G, paragraph ■ 3.10.1 of this guide and in the case of action concerning criminal offences, paragraph ■ 12.4.1.

Investigations into PRA-authorised persons

2.5.2

A need for a joint investigation with the *PRA* may arise where either the *FCA* or the *PRA* identifies circumstances which suggest that a *firm* or individual has committed misconduct that adversely affects both regulators' *statutory objectives*. In such cases, the regulators will determine whether they should carry out separate but coordinated investigations, or whether it would be more appropriate for one of the regulators to carry out an investigation, keeping the other informed. (See also ■ EG 4.14.1 to ■ EG 4.14.2).

2.6 Assisting overseas regulators

2.6.1

The *FCA* views co-operation with its overseas counterparts as an essential part of its regulatory functions. Section 354A of the *Act* imposes a duty on the *FCA* to take such steps as it considers appropriate to co-operate with others who exercise functions similar to its own. This duty extends to authorities in the UK and overseas. In fulfilling this duty the *FCA* may share information which it is not prevented from disclosing, including information obtained in the course of the *FCA*'s own investigations, or exercise certain of its powers under Part XI of the *Act*. Further details of the *FCA*'s powers to assist overseas regulators are provided at ■ EG 3.7.1 – ■ 3.7.4 (Investigations to assist overseas authorities), ■ EG 3.8.1 – ■ 3.8.4 (Information requests and investigations to assist EEA regulators in relation to short selling), ■ EG 3.8A (Information requests and entry of premises under warrant to assist EEA regulators in relation to the Market Abuse Regulation), ■ EG 4.7.1 (Use of statutory powers to require the production of documents, the provision of information or the answering of questions), ■ EG 4.11.9 – ■ 4.11.11 (Interviews in response to a request from an overseas regulator or EEA regulator), and ■ EG 8.6.1 – ■ 8.6.8 (Exercising the power under section 55Q to vary or cancel a firm's Part 4A permission, or to impose requirements on a firm in support of an overseas regulator: the *FCA*'s policy). The *FCA*'s statement of policy in relation to interviews which representatives of overseas regulators or EEA regulators attend and participate in is set out in ■ DEPP 7.



2.7 Sources of cases

2.7.1

The *FCA* may be alerted to possible contraventions or breaches by complaints from the public or *firms*, by referrals from other authorities or through its own enquiries and supervisory activities. *Firms* may also bring their own contraventions to the *FCA's* attention, as they are obliged to do under Principle 11 of the *Principles for Businesses* and rules in the *FCA's* Supervision manual.

2.8 Enforcement and the FCA's Principles for Business ('the Principles')

- 2.8.1** The *FCA's* approach to regulation involves a combination of high-level principles and detailed *rules* and *guidance*.
- 2.8.2** The *FCA* will, in appropriate cases, take enforcement action on the basis of the *Principles* alone (see also ■ DEPP 6.2.14 G). This will have the benefit of providing further clear examples of how the *Principles* work in practice.
- 2.8.3** The *FCA* wishes to encourage firms to exercise judgement about, and take responsibility for, what the *Principles* mean for them in terms of how they conduct their business. But we also recognise the importance of an environment in which *firms* understand what is expected of them. So we have indicated that *firms* must be able reasonably to predict, at the time of the action concerned, whether the conduct would breach the *Principles*. This has sometimes been described as the "reasonable predictability test" or "condition of predictability", but it would be wrong to think of this as a legal test to be met in deciding whether there has been a breach of *FCA rules*. Rather, our intention has been to acknowledge that firms may comply with the *Principles* in different ways; and to indicate that the *FCA* will not take enforcement action unless it was possible to determine at the time that the relevant conduct fell short of our requirements.
- 2.8.4** To determine whether there has been a failure to comply with a *Principle*, the standards we will apply are those required by the *Principles* at the time the conduct took place. The *FCA* will not apply later, higher standards to behaviour when deciding whether to take enforcement action for a breach of the *Principles*. Importantly, however, where conduct falls below expected standards the *FCA* considers that it is legitimate for consequences to follow, even if the conduct is widespread within the industry or the *Principle* is expressed in general terms.

2.9 FCA guidance and supporting materials

2

- 2.9.1** The *FCA* uses *guidance* and other materials to supplement the *Principles* where it considers this would help *firms* to decide what action they need to take to meet the necessary standard.
- 2.9.2** *Guidance* is not binding on those to whom the *FCA's rules* apply. Nor are the variety of materials (such as case studies showing good or bad practice, *FCA* speeches, and generic letters written by the *FCA* to Chief Executives in particular sectors) published to support the *rules* and *guidance* in the Handbook. Rather, such materials are intended to illustrate ways (but not the only ways) in which a person can comply with the relevant *rules*.
- 2.9.3** ■ DEPP 6.2.1G(4) explains that the *FCA* will not take action against someone where we consider that they have acted in accordance with what we have said. However, *guidance* does not set out the minimum standard of conduct needed to comply with a *rule*, nor is there any presumption that departing from *guidance* indicates a breach of a *rule*. If a *firm* has complied with the *Principles* and other *rules*, then it does not matter whether it has also complied with other material the *FCA* has issued.
- 2.9.4** *Guidance* and supporting materials are, however, potentially relevant to an enforcement case and a decision maker may take them into account in considering the matter. Examples of the ways in which the *FCA* may seek to use *guidance* and supporting materials in an enforcement context include:
- (1) To help assess whether it could reasonably have been understood or predicted at the time that the conduct in question fell below the standards required by the *Principles*.
 - (2) To explain the regulatory context.
 - (3) To inform a view of the overall seriousness of the breaches e.g. the decision maker could decide that the breach warranted a higher penalty in circumstances where the *FCA* had written to chief executives in the sector in question to reiterate the importance of ensuring a particular aspect of its business complied with relevant regulatory standards.
 - (4) To inform the consideration of a *firm's* defence that the *FCA* was judging the *firm* on the basis of retrospective standards.

(5) To be considered as part of expert or supervisory statements in relation to the relevant standards at the time.

2.9.5

The extent to which *guidance* and supporting materials are relevant will depend on all the circumstances of the case, including the type and accessibility of the statement and the nature of the *firm's* defence. It is for the decision maker (see paragraphs ■ 2.15.1 to ■ 2.15.3) - whether the *RDC*, *Tribunal* or an executive decision maker - to determine this on a case- by-case basis.

2.9.6

The *FCA* may take action in areas in which it has not issued *guidance* or supporting materials.

2.10 Industry guidance

- 2.10.1** The *FCA* recognises that Industry Guidance has an important part to play in a principles- based regulatory environment, and that firms may choose to follow such guidance as a means of seeking to meet the *FCA*'s requirements. This will be true especially where Industry Guidance has been 'confirmed' by the *FCA*. ■ DEPP 6.2.1G(4) confirms that, as with *FCA guidance* and supporting materials, the *FCA* will not take action against a firm for behaviour that we consider is in line with *FCA*-confirmed Industry Guidance that was current when the conduct took place.
- 2.10.2** Equally, however, *FCA*-confirmed Industry Guidance is not mandatory. The *FCA* does not regard adherence to Industry Guidance as the only means of complying with *FCA rules* and *Principles*. Rather, it provides examples of behaviour which meets the *FCA*'s requirements; and non-compliance with confirmed Industry Guidance creates no presumption of a breach of those requirements.
- 2.10.3** Industry Guidance may be relevant to an enforcement case in ways similar to those described at paragraph ■ 2.9.4. But the *FCA* is aware of the concern that *firms* must have scope to exercise their own judgement about what *FCA rules* require, and that Industry Guidance should not become a new prescriptive regime in place of detailed *FCA rules*. This, and the specific status of *FCA*-confirmed Industry Guidance, will be taken into account when the *FCA* makes judgements about the relevance of Industry Guidance in enforcement cases.

2.10A FCA-recognised industry codes

2.10A.1 The *FCA* believes that industry codes of conduct have an important part to play in a principles-based regulatory environment. Individuals may choose to follow, and *firms* have regard to, such codes as a means of seeking to meet the *FCA*’s requirements to conform to proper standards of market conduct. This will be true especially where industry codes of conduct have been ‘recognised’ by the *FCA*. ■ DEPP 6.2.1G(4A) confirms that behaviour that is in line with an *FCA-recognised industry code* will tend to indicate compliance, in carrying out *unregulated activities*, with applicable *FCA rules* that reference ‘proper standards of market conduct’.

2.10A.2 G

2.10A.2 Equally, however, *FCA-recognised industry codes*, and codes that have not been recognised, are not mandatory. The *FCA* does not regard adherence to industry or market codes as the only means of complying with applicable *FCA rules*. Rather, they may provide an articulation of proper standards of market conduct which meets the *FCA*’s requirements.



2.11 Senior management responsibility

2.11.1

The FCA is committed to ensuring that senior managers of *firms* fulfil their responsibilities. The FCA expects senior management to take responsibility for ensuring *firms* identify risks, develop appropriate systems and controls to manage those risks, and ensure that the systems and controls are effective in practice. Where senior managers have failed to meet our standards, the FCA will, where appropriate, bring cases against individuals as well as, or instead of, *firms*. The FCA believes that deterrence will most effectively be achieved by making these individuals realise the consequences of their actions. The FCA's policy on disciplinary action against senior management and against other individuals under section 66 of the Act is set out in ■ DEPP 6.2.4G to ■ DEPP 6.2.9-BG. The FCA's policy on prohibition and withdrawal of approval is set out in ■ EG 9.

2.11.2

The FCA recognises that cases against individuals are very different in their nature from cases against corporate entities and the FCA is mindful that an individual will generally face greater risks from enforcement action, in terms of financial implications, reputation and livelihood than would a corporate entity. As such, cases against individuals tend to be more strongly contested, and at many practical levels are harder to prove. They also take longer to resolve. However, taking action against individuals sends an important message about the FCA's *statutory objectives* and priorities and the FCA considers that such cases have important deterrent values. The FCA is therefore committed to pursuing appropriate cases robustly, and will dedicate sufficient resources to them to achieve effective outcomes.

2.12 Co-operation

2.12.1

An important consideration before an enforcement investigation and/or enforcement action is taken forward is the nature of a *firm's* overall relationship with the *FCA* and whether, against that background, the use of enforcement tools is likely to further the *FCA's* aims and objectives. So, for any similar set of facts, using enforcement tools will be less likely if a *firm* has built up over time a strong track record of taking its senior management responsibilities seriously and been open and communicative with the *FCA*. In addition, a *firm's* conduct in response to the specific issue which has given rise to the question of whether enforcement tools should be used will also be relevant. In this respect, relevant matters may include whether the *person* has self-reported, helped the *FCA* establish the facts and/or taken remedial action such as addressing any systems and controls issues and compensating any consumers who have lost out. Such matters will not, however, necessarily mean that enforcement tools will not be used. The *FCA* has to consider each case on its merits and in the wider regulatory context, and any such steps cannot automatically lead to no enforcement sanction. However, they may in any event be factors which will mitigate the penalty.

2.12.2

On its web site, the *FCA* gives anonymous examples of where it has decided not to investigate or take enforcement action in relation to a possible *rule* breach because of the way in which the *firm* has conducted itself when putting the matter right. This is part of an article entitled 'The benefits to firms and individuals of co-operating with the *FCA*'. However, in those cases where enforcement action is not taken and/or a formal investigation is not commenced, the *FCA* will expect the *firm* to act promptly to take the necessary remedial action agreed with its supervisors to deal with the *FCA's* concerns. If the *firm* does not do this, the *FCA* may take disciplinary or other enforcement action in respect of the original contravention.

2.13 Late reporting or non-submission of reports to the FCA

2.13.1

The FCA attaches considerable importance to the timely submission by *firms* of reports required under *FCA rules*. This is because the information contained in such reports is essential to the FCA's assessment of whether a *firm* is complying with the requirements and standards of the regulatory system and to the FCA's understanding of that *firm's* business. So, in the majority of cases involving non-submission of reports or repeated failure to submit complete reports on time, the FCA considers that it will be appropriate to seek to cancel the *firm's permission*. Where the FCA does not cancel a *permission*, it may take action for a financial penalty against a *firm* that submits a report after the due date (see ■ DEPP 6.6.1 G to ■ DEPP 6.6.5 G).

2.14 Legal review

2.14.1

Before a case is referred to the *RDC*, it will be subject to a legal review by a lawyer who has not been a part of the investigation team. This will help to ensure that there is consistency in the way in which our cases are put and that they are supported by sufficient evidence. A lawyer who has not been a part of the investigation team will also review *warning notices* before they are submitted to the *settlement decision makers*.

2.15 Decision making in the context of regulatory enforcement action

- 2.15.1** When the *FCA* is proposing to exercise its regulatory enforcement powers, the *Act* generally requires the *FCA* to give *statutory notices* (depending on the nature of the action, a *warning notice* and *decision notice* or *supervisory notice*) to the subject of the action. The person to whom a *warning notice* or *supervisory notice* is given has a right to make representations on the *FCA*'s proposed decision.
- 2.15.2** The procedures the *FCA* will follow when giving *supervisory notices*, *warning notices* and *decision notices* are set out in ■ DEPP 1 to ■ 5. Under these procedures, the decisions to issue such notices in contested enforcement cases are generally taken by the *RDC*, an *FCA* Board committee that is appointed by, and accountable to, the *FCA* Board for its decisions generally. Further details about the *RDC* can be found in ■ DEPP 3 and on the pages of the *FCA* web site relating to the *RDC*. However, decisions on settlements and *statutory notices* arising from them are taken by two members of the *FCA*'s senior management, under a special settlement decision procedure (see ■ chapter 5).
- 2.15.3** A *person* who receives a *decision notice* or *supervisory notice* has a right to refer the matter to the *Tribunal* within prescribed time limits. The *Tribunal* is independent of the *FCA* and members of the *Tribunal* are appointed by the Lord Chancellors Department. Where a matter has been referred to it, the *Tribunal* will determine what action, if any, it is appropriate for the *FCA* to take in relation to that matter. Further details about the *Tribunal* can be found in an item on the *Tribunal* on the Enforcement pages of the *FCA* web site and on the *Tribunal*'s own web site.

