

Chapter 3

Use of information gathering and investigation powers

3.1 Introduction

3.1.1

The *FCA* has various powers under sections 97, 122A, 122B, 122C, 131E, 131FA, 165 to 169 and 284 of the *Act* and Schedule 5 to the *CRA* to gather information and appoint investigators, and to require the production of a report by a *skilled person*. In any particular case, the *FCA* will decide which powers, or combination of powers, are most appropriate to use having regard to all the circumstances. Further comments on the use of these powers are set out below.

3.1.2

Information may also be provided to the *FCA* voluntarily. For example, *firms* may at times commission an internal investigation or a report from an external law firm or other professional adviser and decide to pass a copy of this report to the *FCA*. Such reports can be very helpful for the *FCA* in circumstances where enforcement action is anticipated or underway. The *FCA's* approach to using firm-commissioned reports in an enforcement context is set out at the end of this chapter.



3.2 Information requests (section 165)

- 3.2.1** The *FCA* may use its section 165 power to require information and documents from *firms* to support both its supervisory and its enforcement functions.

- 3.2.2** An officer with authorisation from the *FCA* may exercise the section 165 power to require information and documents from *firms*. This includes an *FCA* employee or an agent of the *FCA*.

3.2A Information requests (section 122A)

- 3.2A.1** The *FCA* may use its section 122A power to require information and documents from an *issuer*, a *person discharging managerial responsibilities* or a *person* closely associated with a *person discharging managerial responsibilities* to support its supervisory and its enforcement functions, including those under the *Market Abuse Regulation* or any directly applicable *EU* regulation made under the *Market Abuse Regulation*.
- 3.2A.2** An officer with authorisation from the *FCA* may exercise the section 122A power to require information and documents. This includes an *FCA* employee or an agent of the *FCA*.



3.2B Information requests (section 122B)

3.2B.1

The *FCA* may use its section 122B power to require information and documents from a person to support both its supervisory and its enforcement functions under the *Market Abuse Regulation* or any directly applicable *EU* regulation made under the *Market Abuse Regulation*, or under the *auction regulation*.

[**Note:** see Regulation 6 and Schedule 1 to the *RAP Regulations* for application of the power in relation to functions under the *auction regulation*]

3.2B.2

An *officer* with authorisation from the *FCA* may exercise the section 122B power to require information and documents. This includes an *FCA* employee or an agent of the *FCA*.

3.3 Reports by skilled persons (section 166)

- 3.3.1** Under section 166 of the *Act*, the *FCA* has a power to require a *firm* and certain other persons to provide a report by a *skilled person*, or itself to appoint a *skilled person* to produce such a report. The *FCA* may use its section 166 power to require reports by *skilled persons* to support both its supervision and enforcement functions.
- 3.3.2** The factors the *FCA* will consider when deciding whether to use the section 166 power include:
- (1) If the *FCA*'s objectives for making further enquiries are predominantly for the purposes of fact finding i.e. gathering historic information or evidence for determining whether enforcement action may be appropriate, the *FCA*'s information gathering and investigation powers under sections 167 and 168 of the *Act* are likely to be more effective and more appropriate than the power under section 166.
 - (2) If the *FCA*'s objectives include obtaining expert analysis or recommendations (or both) for, say, the purposes of seeking remedial action, it may be appropriate to use the power under section 166 instead of, or in conjunction with, the *FCA*'s other available powers.
- 3.3.3** Where it exercises this power, the *FCA* will make clear both to the *firm* and to the *skilled person* the nature of the concerns that led the *FCA* to decide to appoint a *skilled person* and the possible uses of the results of the report. But a report the *FCA* commissions for purely diagnostic purposes could identify issues which could lead to the appointment of an investigator and/or enforcement action.
- 3.3.4** Under section 166A of the *Act*, the *FCA* also has a power to require a *firm* to appoint a *skilled person* to collect or update information, or itself to appoint a *skilled person* to do so, where it considers that the *firm* has failed to provide information required by the *FCA* or update information previously provided to the *FCA*.
- 3.3.5** ■ Chapter 5 of the *FCA*'s Supervision manual (Reports by skilled persons) contains *rules* and guidance that will apply whenever the *FCA* uses the section 166 and 166A powers.



3.4 Investigations into general and specific concerns (sections 167 and 168)

3.4.1

Where the *FCA* has decided that an investigation is appropriate (see ■ chapter 2) and it appears to it that there are circumstances suggesting that contraventions or offences set out in section 168 may have happened, the *FCA* will normally appoint investigators pursuant to section 168. Where the circumstances do not suggest any specific breach or contravention covered by section 168, but, the *FCA* still has concerns about a *firm*, an *appointed representative*, a *recognised investment exchange* or an unauthorised *incoming ECA provider*, such that it considers there is good reason to conduct an investigation into the nature, conduct or state of the *person's* business or a particular aspect of that business, or into the ownership or control of an *authorised person*, the *FCA* may appoint investigators under section 167.

3.4.2

In some cases involving both general and specific concerns, the *FCA* may consider it appropriate to appoint investigators under both section 167 and section 168 at the outset. Also, where, for example, it has appointed investigators under section 167, it may subsequently decide that it is appropriate to extend the appointment to cover matters under section 168 as well.

3.5 Official listing investigations (section 97)

3.5.1

If the *FCA* has decided to carry out an investigation where there are circumstances suggesting that contraventions set out in section 97 may have happened, it will normally appoint investigators pursuant to that section. An investigator appointed under section 97 is treated under the *Act* as if they were appointed under section 167(1).



3.6 Investigations into collective investment schemes (section 284)

3.6.1

The *FCA* may appoint investigators under section 284 to conduct an investigation into the affairs of a *collective investment scheme* if it appears to it that it is in the interests of the participants or general participants to do so or that the matter is of public concern.

3.7 Investigations to assist overseas authorities (section 169)

3.7.1 The *FCA's* power to conduct investigations to assist overseas authorities is contained in section 169 of the *Act*. The section provides that at the request of an *overseas regulator*, the *FCA* may use its power under section 165 to require the production of documents or the provision of information under section 165 or to appoint a person to investigate any matter.

3.7.2 If the *overseas regulator* is a *competent authority* and makes a request in pursuance of any Community obligation, section 169(3) states that the *FCA* must, in deciding whether or not to exercise its investigative power, consider whether the exercise of that power is necessary to comply with that obligation.

3.7.3 Section 169(4) and (5) set out factors that the *FCA* may take into account when deciding whether to use its investigative powers. However, these provisions do not apply if the *FCA* considers that the use of its investigative powers is necessary to comply with a Community obligation.

3.7.4 When it considers whether to use its investigative power, and whether section 169(4) applies, the *FCA* will first consider whether it is able to assist without using its formal powers, for example by obtaining the information voluntarily. Where that is not possible, the *FCA* may take into account all of the factors in section 169(4), but may give particular weight to the seriousness of the case and its importance to persons in the United Kingdom, and to the public interest.



3.8 Information requests and investigations to assist EEA regulators in relation to short selling

- 3.8.1** The *FCA* may use its section 131E power to require information and documents from natural or legal persons to support both its monitoring and its enforcement functions.
- 3.8.2** An officer with authorisation from the *FCA* may exercise the section 131E power to require information and documents from natural or legal persons. This includes an *FCA* employee or an agent of the *FCA*.
- 3.8.3** The *FCA*'s power to conduct investigations to assist *EEA regulators* in respect of the *short selling regulation* is contained in section 131FA of the *Act*. The section provides that at the request of an *EEA regulator* or *ESMA*, the *FCA* may either use its power under section 131E to require the production of information, or appoint a person to investigate any matter.
- 3.8.4** Section 131FA states that the *FCA* must, in deciding whether or not to exercise its investigative power, consider whether the exercise of that power is necessary to comply with an obligation under the *short selling regulation*.

3.8A Information requests and entry of premises under warrant to assist EEA regulators in relation to the Market Abuse Regulation or the auction regulation

- 3.8A.1** The *FCA* may use its section 122B power to require information and documents from natural or legal persons to support both its supervisory and its enforcement functions.
- 3.8A.2** The *FCA's* power to require information to assist *EEA regulators* in respect of the *Market Abuse Regulation* or any directly applicable *EU* regulation made under the *Market Abuse Regulation* or the *auction regulation* is contained in section 122B(6) of the *Act*. The section provides that at the request of an *EEA regulator*, the *FCA* may use its power under section 122B to require the production of information.
- [**Note:** see Regulation 6 and Schedule 1 to the *RAP Regulations* in relation to the *auction regulation*]
- 3.8A.3** Section 122B(7) of the *Act* states that the *FCA* must, in deciding whether or not to exercise its power to require information, consider whether the exercise of that power is necessary to comply with the *Market Abuse Regulation* or any directly applicable *EU* regulation made under the *Market Abuse Regulation* or the *auction regulation*.
- 3.8A.4** The *FCA* may give information under 122D(1) or 176(1) (Entry of premises under warrant) at the request of an *EEA regulator* where the regulator makes the request in the exercise of its functions under the *Market Abuse Regulation*. Section 122D(11) of the *Act* states that the *FCA* must, in deciding whether or not to exercise its powers of entry of premises under warrant, consider whether the exercise of that power is necessary for the purpose of the exercise by it of its obligations under the *Market Abuse Regulation* or any directly applicable *EU* regulation made under the *Market Abuse Regulation* or the *auction regulation*.



3.8B Information requests and investigations under the enhanced supervision of EEA firms under the Insurance Distribution Directive

3.8B1

Under the *IDD*, where an *EEA firm's* primary place of business is located in the *United Kingdom* rather than in its home member state, section 203A allows the *FCA* to enter into an agreement with that *firm's Home State* regulator to exercise certain functions as if the *firm* were a *UK firm*. This same power but in reverse allows by virtue of section 203B the *FCA* to agree that an *EEA regulator* can exercise certain functions in respect of a *UK firm* whose primary place of business is in that *EEA member state* (see also ■ SUP 13.11A.2G). A *firm* will be notified of such an agreement without delay.

3.9 Power to require information relating to potentially unfair etc terms and notices

3.9.1

Schedule 5 to the *CRA* gives:

- (1) the *FCA*; and
- (b) any other *person*, who may be an *FCA* employee, specifically authorised or appointed by the *FCA* for this purpose;

the power to require, by notice in writing, which must contain the particulars specified by paragraph 15 of Schedule 5, the production of information to enable the *FCA* to ascertain whether a *person* has complied with or is complying with an *injunction* granted or an undertaking given under Schedule 3 to the *CRA*, as described in paragraphs ■ 10.6.2 to ■ 10.6.12 below; and

- (2) such an appointed or authorised *person* the same power to enable the *FCA* to:
 - (a) seek an *injunction* or undertaking under Schedule 3; or
 - (b) consider whether to do so;

but only if that *person* reasonably suspects that an unfair term or notice within the scope of Schedule 3 is being used or proposed or recommended to be used.



3.10 Liaison where other authorities have an interest

3.10.1

The *FCA* has agreed guidelines that establish a framework for liaison and cooperation in cases where certain other UK authorities have an interest in investigating or prosecuting any aspect of a matter that the *FCA* is considering for investigation, is investigating or is considering prosecuting. These guidelines are set out in ■ Annex 2 to this guide.

3.10.2

Information requests in joint investigations with the PRA

In certain circumstances, it will be appropriate and expedient for the *FCA* and *PRA* to issue a joint information request where there is a joint investigation. Where a joint information request is issued to a *firm* or *individual*, the request will make it clear to which investigation(s) it relates.



3.11 FCA approach to firms conducting their own investigations in anticipation of enforcement action

Firm-commissioned reports: the desirability of early discussion and agreement where enforcement is anticipated

3.11.1 The *FCA* recognises that there are good reasons for *firms* wishing to carry out their own investigations. This might be for, for example, disciplinary purposes, general good management, or operational and risk control. The *firm* needs to know the extent of any problem, and it may want advice as to what immediate or short-term measures it needs to take to mitigate or correct any problems identified. The *FCA* encourages this proactive approach and does not wish to interfere with a *firm's* legitimate procedures and controls.

3.11.2 A *firm's* report – produced internally or by an external third party – can clearly assist the *firm*, but may also be useful to the *FCA* where there is an issue of regulatory concern. Sharing the outcome of an investigation can potentially save time and resources for both parties, particularly where there is a possibility of the *FCA* taking enforcement action in relation to a *firm's* perceived misconduct or failing. This does not mean that *firms* are under any obligation to share the content of legally privileged reports they are given or advice they receive. It is for the *firm* to decide whether to provide such material to the *FCA*. But a *firm's* willingness to volunteer the results of its own investigation, whether protected by legal privilege or otherwise, is welcomed by the *FCA* and is something the *FCA* may take into account when deciding what action to take, if any. (The *FCA's* approach to deciding whether to take action is described in more detail in ■ DEPP 6.2 and ■ paragraph 2.1.4 of this Guide.)

3.11.3 Work done or commissioned by the *firm* does not fetter the *FCA's* ability to use its statutory powers, for example to require a skilled person's report under section 166 of the *Act* or to carry out a formal enforcement investigation; nor can a report commissioned by the *firm* be a substitute for formal regulatory action where this is needed or appropriate. But even if formal action is needed, it may be that a report could be used to help the *FCA* decide on the appropriate action to take and may narrow the issues or obviate the need for certain work.

3.11.4 The *FCA* invites *firms* to consider, in particular, whether to discuss the commissioning and scope of a report with *FCA* staff where:

- (1) *firms* have informed the *FCA* of an issue of potential regulatory concern, as required by ■ SUP 15; or
- (2) the *FCA* has indicated that an issue or concern has or may result in a referral to Enforcement.

3.11.5

The *FCA*'s approach in commenting on the proposed scope and purpose of the report will vary according to the circumstances in which the report is commissioned; it does not follow that the *FCA* will want to be involved in discussing the scope of a report in every situation. But if the *firm* anticipates that it will proactively disclose a report to the *FCA* in the context of an ongoing or prospective enforcement investigation, then the potential use and benefit to be derived from the report will be greater if the *FCA* has had the chance to comment on its proposed scope and purpose.

3.11.6

Some themes or issues are common to any discussion about the potential use or value of a report to the *FCA*. These include:

- (1) to what extent the *FCA* will be able to rely on the report in any subsequent enforcement proceedings;
- (2) to what extent the *FCA* will have access to the underlying evidence or information that was relied upon in producing the report;
- (3) where legal privilege or other professional confidentiality is claimed over any material gathered or generated in the investigation process, to what extent such material may nevertheless be disclosed to the *FCA*, on what basis and for what purposes the *FCA* may use that material;
- (4) what approach will be adopted to establishing the relevant facts and how evidence will be recorded and retained;
- (5) whether any conflicts of interest have been identified and whether there are proposals to manage them appropriately;
- (6) whether the report will describe the role and responsibilities of identified individuals;
- (7) whether the investigation will be limited to ascertaining facts or will also include advice or opinions about breaches of *FCA rules* or requirements;
- (8) how the *firm* intends to inform the *FCA* of progress and communicate the results of the investigation; and
- (9) timing.

3.11.7

In certain circumstances the *FCA* may prefer that a *firm* does not commission its own investigation (whether an internal audit report or a report by external advisers) because action by the *firm* could itself be damaging to an *FCA* investigation. This is true in particular of criminal investigations, where alerting the suspects could have adverse consequences. For example, where the *FCA* suspects that individuals are abusing positions of trust within financial institutions and that an insider dealing ring is operating, it might

notify the relevant *firm* but would not want the *firm* to embark on its own investigation: to do so would alert those under investigation and prejudice on-going monitoring of the suspects and other action. Firms are therefore encouraged to be alive to the possibility that their own investigations could prejudice or hinder a subsequent *FCA* investigation, and, if in doubt, to discuss this with the *FCA*. The *FCA* recognises that *firms* may be under time and other pressures to establish the relevant facts and implications of possible misconduct, and will have regard to this in discussions with the *firm*.

3.11.8 Nothing in ■ paragraphs 3.11.1 to ■ 3.11.7 extends or increases the scope of the existing duty to report facts or issues to the *FCA* in accordance with ■ SUP 15 or Principle 11.

Firm-commissioned reports: material gathered

3.11.9 Where a *firm* does conduct or commission an investigation, it is very helpful if the *firm* maintains a proper record of the enquiries made and interviews conducted. This will inform the *FCA*'s judgment about whether any further work is needed and, if so, where the *FCA*'s efforts should be focused.

3.11.10 How the results of an investigation are presented to the *FCA* may differ from case to case; the *FCA* acknowledges that different circumstances may call for different approaches. In this sense, one size does not fit all. The *FCA* will take a pragmatic and flexible approach when deciding how to receive the results of an investigation. However, if the *FCA* is to rely on a report as the basis for taking action, or not taking action, then it is important that the *firm* should be prepared to give the *FCA* underlying material on which the report is based as well as the report itself. This includes, for example, notes of interviews conducted by the lawyers, accountants or other professional experts carrying out the investigation.

3.11.11 The *FCA* is not able to require the production of "protected items", as defined in the *Act*, but it is not uncommon for there to be disagreement with *firms* about the scope of this protection. Arguments about whether certain documents attract privilege tend to be time-consuming and delay the progress of an investigation. If a *firm* decides to give a report to the *FCA*, then the *FCA* considers that the greatest mutual benefit is most likely to flow from disclosure of the report itself and any supporting papers. A reluctance to disclose these source materials will, in the *FCA*'s opinion, devalue the usefulness of the report and may require the *FCA* to undertake additional enquiries.

Firm-commissioned reports: FCA use of reports and the protection of privileged and confidential material

3.11.12 For reasons that the *FCA* can understand, *firms* may seek to restrict the use to which a report can be put, or assert that any legal privilege is waived only on a limited basis and that the *firm* retains its right to assert legal privilege as the basis for non-disclosure in civil proceedings against a private litigant.

3.11.13 The *FCA* understands that the concept of a limited waiver of legal privilege is not one which is recognised in all jurisdictions; the *FCA* considers that English law does permit such "limited waiver" and that legal privilege could still be

asserted against third parties notwithstanding disclosure of a report to the *FCA*. However, the *FCA* cannot accept any condition or stipulation which would purport to restrict its ability to use the information in the exercise of the *FCA*'s statutory functions. In this sense, the *FCA* cannot 'close its eyes' to information received or accept that information should, say, be used only for the purposes of supervision but not for enforcement.

3.11.14

This does not mean that information provided to the *FCA* is unprotected. The *FCA* is subject to strict statutory restrictions on the disclosure of confidential information (as defined in section 348 of the *Act*), breach of which is a criminal offence (under section 352 of the *Act*). Reports and underlying materials provided voluntarily to the *FCA* by a firm, whether covered by legal privilege or not, are confidential for these purposes and benefit from the statutory protections.

3.11.15

Even in circumstances where disclosure of information would be permitted under the "gateways" set out in the Financial Services and Markets Act 2000 (Disclosure of Confidential Information) Regulations, the *FCA* will consider carefully whether it would be appropriate to disclose a report provided voluntarily by a *firm*. The *FCA* appreciates that *firms* feel strongly about the importance of maintaining confidentiality, and that *firms* are more likely to volunteer information to the regulator when they know that the regulator is mindful of this sensitivity and the impact of potential disclosure. Accordingly, if the *FCA* contemplates disclosing a report voluntarily provided by a *firm*, the *firm* will normally be notified and given the opportunity to make representations about the proposed disclosure. The exceptions to this include circumstances where disclosure is urgently needed, where notification might prejudice an investigation or defeat the purpose for which the information had been requested, or where notification would be inconsistent with the *FCA*'s international obligations.

