

Chapter 3

Use of information gathering and investigation powers



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.