


## Chapter 4

# Conduct of investigations

### 4.1 Notifying the person under investigation where notice is a requirement under section 170

#### 4.1.1

The *FCA* will always give written notice of the appointment of investigators to the *person* under investigation if it is required to give such notice under section 170 of the *Act*. In such cases, if there is a subsequent change in the scope or conduct of the investigation and, in the *FCA*'s opinion, the *person* under investigation is likely to be significantly prejudiced if not made aware of this, that *person* will be given written notice of the change. It is impossible to give a definitive list of the circumstances in which a *person* is likely to be significantly prejudiced by not being made aware of a change in the scope or conduct of an investigation. However, this may include situations where there may be unnecessary costs from dealing with an aspect of an investigation which the *FCA* no longer intends to pursue.



## 4.2 Notifying the person under investigation where notice is not required under the Act

- 4.2.1** The *Act* does not always require the *FCA* to give written notice of the appointment of investigators, for example, where investigators are appointed as a result of section 168(1) or (4) of the *Act* and the *FCA* believes that the provision of notice would be likely to result in the investigation being frustrated, or where investigators are appointed as a result of section 168(2) of the *Act*.
- 4.2.2** Although the *FCA* is not required to give written notice of the appointment of investigators appointed as a result of section 168(2), when it becomes clear who the *person* under investigation is, the *FCA* will, nevertheless, normally notify them that they are under investigation when it exercises its statutory powers to require information from them, providing such notification will not, in the *FCA*'s view, prejudice the *FCA*'s ability to conduct the investigation effectively.

## 4.3 Notification where a particular person is not yet under investigation

### 4.3.1

In investigations into possible *insider dealing, market abuse, misleading statements and practices offences, breaches of the general prohibition, the restriction on financial promotion, or the prohibition on promoting collective investment schemes*, the investigator may not know the identity of the perpetrator or may be looking into market circumstances at the outset of the investigation rather than investigating a particular *person*. In those circumstances, the *FCA* will give an indication of the nature and subject matter of its investigation to those who are required to provide information to assist with the investigation. As soon as a *person* becomes the focus of the *FCA's* enquiries, the *FCA* will consider whether it is appropriate to notify that *person* that they are under investigation. The *FCA* will usually notify them when it exercises its statutory powers to require information from them unless doing so would prejudice the *FCA's* ability to conduct the investigation effectively.



## 4.4 Appointment of additional investigators

### 4.4.1

In some cases, the *FCA* will appoint an additional investigator or additional investigators during the course of an investigation. If this occurs and the *FCA* has previously told the subject it has appointed investigators, then the *FCA* will normally give the person written notice of the appointment(s).

## 4.5 Notice of termination of investigations

### 4.5.1

Except where the *FCA* has issued a *warning notice*, and the *FCA* has subsequently discontinued the proceedings, the *Act* does not require the *FCA* to provide notification of the termination of an investigation or subsequent enforcement action. However, where the *FCA* has given a *person* written notice that it has appointed an investigator and later decides to discontinue the investigation without any present intention to take further action, it will confirm this to the *person* concerned as soon as it considers it is appropriate to do so, bearing in mind the circumstances of the case.



## 4.6 What a subject of investigation can say to third parties

### 4.6.1

As is explained in the chapter of this guide on publicity (■ chapter 6), the *FCA* will not normally make public the fact that it is or is not investigating a matter and its expectation is that the *person* under investigation will also treat the matter as confidential. However, subject to the restrictions on disclosure of confidential information in section 348 of the *Act*, this does not stop the *person* under investigation from seeking professional advice or making their own enquiries into the matter, from giving their auditors appropriate details of the matter or from making notifications required by law or contract.

## 4.7 Use of statutory powers to require the production of documents, the provision of information or the answering of questions

### 4.7.1

The *FCA's* standard practice is generally to use statutory powers to require the production of documents, the provision of information or the answering of questions in interview. This is for reasons of fairness, transparency and efficiency. It will sometimes be appropriate to depart from this standard practice, for example:

- (1) For suspects or possible suspects in criminal or *market abuse* investigations, the *FCA* may prefer to question that *person* on a voluntary basis, possibly under caution. In such a case, the interviewee does not have to answer but if they do, those answers may be used against them in subsequent proceedings, including criminal or *market abuse* proceedings.
- (2) In the case of third parties with no professional connection with the financial services industry, such as the victims of an alleged fraud or misconduct, the *FCA* will usually seek information voluntarily.
- (3) In some cases, the *FCA* is asked by *overseas regulators* or *EEA regulators* to obtain documents or conduct interviews on their behalf. In these cases, the *FCA* will not necessarily adopt its standard approach as it will consider with the *overseas regulator* or *EEA regulator* the most appropriate method for obtaining evidence for use in their country.

### 4.7.2

*Firms, approved persons and conduct rules staff* have an obligation to be open and co-operative with the *FCA* (as a result of Principle 11 for Businesses, Statement of Principle 4 for Approved Persons and *Rule 3* of ■ COCON 2.1). The *FCA* will make it clear to the *person* concerned whether it requires them to produce information or answer questions under the *Act* or whether the provision of answers is purely voluntary. The fact that the *person* concerned may be a regulated person does not affect this.

### 4.7.3

The *FCA* will not bring disciplinary proceedings against a *person* for failing to be open and co-operative with the *FCA* simply because, during an investigation, they choose not to attend or answer questions at a purely voluntary interview. However, there may be circumstances in which an adverse inference may be drawn from the reluctance of a *person* (whether or not they are a *firm* or individual) to participate in a voluntary interview. If a



*person* provides the *FCA* with misleading or untrue information, the *FCA* may consider taking action against them.

### 4.7.4

If a *person* does not comply with a requirement imposed by the exercise of statutory powers, they may be held to be in contempt of court. The *FCA* may also choose to bring proceedings for breach of Principle 11, Statement of Principle 4 or ■ COCON 2.1.3R as this is a serious form of non-cooperation.

## 4.8 Scoping discussions

### 4.8.1

For cases involving *firms*, *approved persons* or *conduct rules staff*, the *FCA* will generally hold scoping discussions with the *firm* or individuals concerned close to the start of the investigation (and may do so in other cases). The purpose of these discussions is to give the *firm* or individuals concerned in the investigation an indication of: why the *FCA* has appointed investigators (including the nature of and reasons for the *FCA*'s concerns); the scope of the investigation; how the process is likely to unfold and an indication of the likely timing of the key milestones and next steps in the investigation; the individuals and documents the team will need access to initially and so on. There may be a limit, however, as to how specific the *FCA* can be about the nature of its concerns in the early stages of an investigation. The *FCA* team for the purposes of the scoping discussions will normally include the nominated supervisor if the subject is a relationship-managed *firm*.

### 4.8.2

In addition to the initial scoping discussions, there will be an ongoing dialogue with the *firm* or individuals throughout the investigative process. We will aim to give periodic updates at least on a quarterly basis covering the steps taken in the investigation to date as well as the next steps in the investigation and indicative timelines. Where the nature of the *FCA*'s concerns changes significantly from that notified to the person under investigation and the *FCA*, having reconsidered the case, is satisfied that it is appropriate in the circumstances to continue the investigation, the *FCA* will notify the person of the change in scope.

## 4.9 Involvement of FCA supervisors during the investigation phase

### 4.9.1

A clear division between the conduct of the investigation the ongoing supervision of the *firm* means that clarity as to who is carrying out what work is important, so that the focus on the various needs of the investigation and supervisory function are not lost. It is also important that the investigation can benefit from the knowledge of the *firm* or individuals that the supervisors will have built up, or from their general understanding of the *firm's* business or sector. In most (if not all) cases, assistance from a referring area in informing the investigation team of certain matters (e.g. the *firm's* business model and market practice issues) will be helpful. Following a referral, the *FCA* takes the following general considerations into account in relation to the potential role of a supervisor in an investigation.

- (1) While it is clearly essential for the day-to-day supervisory relationship to continue during the course of any enforcement action, this need not, of itself, preclude a *firm's* supervisor from assisting in an investigation.
- (2) Such assistance will include: making the case team aware of the *firm's* business, history and compliance track record; the current supervisory approach to the area concerned; current issues with the *firm*; and acting as a sounding board on questions that emerge from the investigation about industry practices and standards and any market practice issues. Depending on the issues that arise, it may be appropriate for a supervisor to attend a progress meeting with the *firm*.
- (3) Equally, there may be circumstances where someone in the *FCA* other than the *firm's* supervisor can more effectively and efficiently provide information on the current supervisory approach to the area under investigation or current market standards. In this case it makes good sense for the *FCA* to draw on that other source of expertise.
- (4) In the event that a *firm's* supervisor becomes part of the investigation team, the *FCA* will notify the firm of this in the normal way.
- (5) Where a *firm's* supervisor does not become part of the investigation team, the investigation will keep the *firm's* supervisor (or referring area) updated on the progress of the investigation.

## 4.10 The timeframe for responding to information and document requirements

### 4.10.1

As delays in the provision of information and/or documents can have a significant impact on the efficient progression of an investigation, the *FCA* expects *persons* to respond to information and document requests in a timely manner to appropriate deadlines. When an investigation is complex (and the timetable allows), the *FCA* may decide to issue an information or document requirement in draft, allowing a specified period (of usually no more than three working days) for the *person* to comment on the practicality of providing the information or documentation by the proposed deadline. After considering any comments, the *FCA* will then confirm or amend the request. The *FCA* will not, however, send such a draft request where the request is straightforward and the *FCA* considers that it is reasonable to expect the information or documents to be made available within the *FCA*'s specified timeframe.

### 4.10.2

Once it has formally issued a requirement (whether or not this has been preceded by a draft), the *FCA* will not usually agree to an extension of time for complying with the requirement unless compelling reasons are provided to support an extension request.

## 4.11 Approach to interviews and interview procedures

**4.11.1** ■ Paragraph 4.7.1 explains the *FCA's* approach to the use of its statutory powers to require, amongst other matters, individuals to be interviewed. The type of interview is a decision for the *FCA*.

**4.11.2** A *person* required to attend an interview by the use of statutory powers has no entitlement to insist that the interview takes place voluntarily. If someone does not attend an interview required under the *Act*, then he can be dealt with by the court as if he were in contempt (where the penalties can be a fine, imprisonment or both).

**4.11.3** Similarly, a *person* asked to attend an interview on a purely voluntary basis is not entitled to insist that he be served with a requirement. A *person* is not obliged to attend a voluntary interview or to answer questions put to them at that time. But they should be aware that in an appropriate case, an adverse inference may be drawn from the failure to attend a voluntary interview, or a refusal to answer any questions at such an interview.

### Interviews generally

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**4.11.4** Where the *FCA* interviews a *person*, it will allow the *person* to be accompanied by a legal adviser, if they wish. The *FCA* will also, where appropriate, explain what use can be made of the answers in proceedings against them. Where the interview is tape-recorded, the *person* will be given a copy of the audio tape of the interview and, where a transcript is made, a copy of the transcript.

### Interviews under caution

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**4.11.5** Individuals suspected of a criminal offence may be interviewed under caution. These interviews will be subject to all the safeguards of the relevant Police and Criminal Evidence Act Codes and are voluntary on the part of the suspect. The *FCA* will warn the suspect at the start of the interview of their right to remain silent (and the consequences of remaining silent) and will inform the suspect that they are entitled to have a legal adviser present. The *FCA* will also give a cautionary warning in similar terms to interviewees who are the subject of *market abuse* investigations.

**Subsequent interviews**

4.11.6

If a suspect has been interviewed by the *FCA* using statutory powers, before they are re-interviewed on a voluntary basis (under caution or otherwise), the *FCA* will explain the difference between the two types of interview. The *FCA* will also tell the individual about the limited use that can be made of their previous answers in criminal proceedings or in proceedings in which the *FCA* seeks a penalty for *market abuse* under Part VIII of the *Act*.

4.11.7

Conversely, where a suspect has been interviewed under caution, and the *FCA* later wishes to conduct a compulsory interview with them, the *FCA* will explain the difference between the two types of interview, and will notify the individual of the limited use that can be made of his answers in the compulsory interview.

**Interviews under arrest**

4.11.8

On occasion, where the police have a power of arrest, the *FCA* may make a request to the police for assistance to arrest the individual for questioning by the *FCA* (*FCA* investigators do not have powers of arrest), for example:

- (1) where it appears likely that inviting an individual to attend on a voluntary basis would prejudice an ongoing investigation or risk the destruction of evidence or the dissipation of assets; or
- (2) where a suspect declines an invitation to attend a voluntary interview.

The procedure the *FCA* may follow on such occasions in seeking assistance from the police is set out in a Memorandum of Understanding with the Association of Chief Police Officers of England, Wales and Northern Ireland dated 3 August 2005.

**Interviews in response to a request from an overseas regulator or EEA regulator**

4.11.9

Where the *FCA* has appointed an investigator in response to a request from an *overseas regulator* or *EEA regulator*, it may, under sections 169(7) or 131FA of the *Act* respectively, direct the investigator to allow a representative of that regulator to attend, and take part in, any interview conducted for the purposes of the investigation. However, the *FCA* may only use this power if it is satisfied that any information obtained by an *overseas regulator* or *EEA regulator* as a result of the interview will be subject to safeguards equivalent to those in Part XXIII of the *Act* (sections 169(8) and 131FA respectively).

4.11.10

The factors that the *FCA* may take into account when deciding whether to make a direction under section 169(7) include the following:

- (1) the complexity of the case;
- (2) the nature and sensitivity of the information sought;
- (3) the *FCA*'s own interest in the case;

- (4) costs, where no Community obligation is involved, and the availability of resources; and
- (5) the availability of similar assistance to UK authorities in similar circumstances.

4.11.11

Under sections 169(9) and 131FA respectively, the *FCA* is required to prepare a statement of policy with the approval of the Treasury on the conduct of interviews attended by representatives of *overseas regulators* or *EEA regulators*. The statement is set out in ■ DEPP 7.

## 4.12 Search and seizure powers

### 4.12.1

Under sections 176 and 122D of the *Act*, the *FCA* has the power to apply to a justice of the peace for a warrant to enter premises where documents or information is held. The circumstances under which the *FCA* may apply for a search warrant include:

- (1) where a *person* on whom an information requirement has been imposed fails (wholly or in part) to comply with it; or
- (2) where there are reasonable grounds for believing that if an information requirement were to be imposed, it would not be complied with, or that the documents or information to which the information requirement relates, would be removed, tampered with or destroyed.

### 4.12.2

A warrant obtained pursuant to sections 176 and 122D of the *Act* authorises a police constable or an *FCA* investigator in the company, and under the supervision of, a police constable, to do the following, amongst other things: to enter and search the premises specified in the warrant and take possession of any documents or information appearing to be documents or information of a kind in respect of which the warrant was issued or to take, in relation to any such documents or information, any other steps which may appear to be necessary for preserving them or preventing interference with them.



## 4.13 Preliminary findings letters and preliminary investigation reports

- 4.13.1** In cases where the *FCA* proposes to submit an investigation report to the *RDC* with a recommendation for regulatory action, the *FCA*'s usual practice is to send a preliminary findings letter to the subject of an investigation before the matter is referred to the *RDC*. The letter will normally annex the investigators' preliminary investigation report. Comment will be invited on the contents of the preliminary findings letter and the preliminary investigation report.
- 4.13.2** The *FCA* recognises that preliminary findings letters serve a very useful purpose in focussing decision making on the contentious issues in the case. This in turn makes for better quality and more efficient decision making. However, there are exceptional circumstances in which the *FCA* may decide it is not appropriate to send out a preliminary findings letter. This includes:
- (1) where the subject consents to not receiving a preliminary findings letter; or
  - (2) where it is not practicable to send a preliminary findings letter, for example where there is a need for urgent action in the interests of consumer protection, restoring market confidence or reducing *financial crime* or if the whereabouts of the subject are unknown; or
  - (3) where the *FCA* believes that no useful purpose would be achieved in sending a preliminary findings letter, for example where it has otherwise already substantially disclosed its case to the subject and the subject has had an opportunity to respond to that case.
- 4.13.3** In cases where it is sent, the preliminary findings letter will set out the facts which the investigators consider relevant to the matters under investigation (normally, as indicated above, by means of an annexed preliminary investigation report). And it will invite the *person* concerned to confirm that those facts are complete and accurate, or to provide further comment. *FCA* staff will allow a reasonable period (normally 28 days) for a response to this letter, and will take into account any response received within the period stated in the letter. They are not obliged to take into account any response received outside that period. If a *firm* or individual requests an extension to the period for responding to the preliminary findings report, the *FCA* will take into account all relevant factors, including the legal and factual complexity of the case, and whether there are any factors outside the control of the *firm* or individual that would materially impact on their ability to respond within the period set out in the preliminary findings letter.

### 4.13.4

Where the *FCA* has sent a preliminary findings letter and it then decides not to take any further action, the *FCA* will communicate this decision promptly to the person concerned.



## 4.14 Joint investigations with the PRA

- 4.14.1** In some cases, it may be appropriate for both the *FCA* and the *PRA* to pursue investigations into different aspects of the same misconduct (see ■ EG 2.5.2).
- 4.14.2** In such cases, the guidance contained in this chapter will apply to the *FCA*'s investigation and the *FCA* will attempt to ensure that the subject of the investigation is not prejudiced or unduly inconvenienced by the fact that there are two investigating authorities. The *FCA* and *PRA* investigation teams will keep each other and their respective supervisory teams informed about the progress of the investigation. Discussions with the *firm* or individual under investigation should normally occur with the representatives of both regulators present.
- 4.14.3** Both the *FCA* and the *PRA* will seek to ensure that, as far as possible, their respective processes (whether for contested or settlement decision-making) occur in a coordinated and timely manner in a joint investigation. For example, the regulators will, where appropriate, endeavour to settle a joint investigation into a relevant *firm* or individual simultaneously.

