

Appendix 3

Appendix 3 - Appendix to the guidelines on investigation of cases of interest or concern to the financial conduct authority and other prosecuting and investigating agencies

3.1 The FCA

App3.1.1 The *FCA* is the single statutory regulator for all financial business in the UK. Its *strategic objective* under the Financial Services and Markets Act 2000 (the 2000 Act) is to ensure that the relevant markets function well. The *FCA*'s operational objectives are:

- 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* in the markets.

(Note: The 2000 Act repealed and replaced various enactments which conferred powers and functions on the *FCA* and other regulators whose functions are now carried out by the *FCA*. Most notable in this context are the Financial Services Act 1986 and the Banking Act 1987. Transitional provisions under the 2000 Act permit the *FCA* to continue to investigate and bring proceedings for offences under the old legislation. Details of these transitional provisions are not set out in these guidelines)

App3.1.2 The *FCA*'s *regulatory objectives* as the competent authority under Part VI of the Act are:

- the protection of investors;
- access to capital; and
- investor confidence.

App3.1.3

Under the 2000 Act the FCA has powers to investigate concerns including:

- regulatory concerns about authorised *firms* and individuals employed by them;
- suspected contraventions of the *Market Abuse Regulation* or any supplementary market abuse legislation (as defined in Part 8 of the Act)
- suspected misleading statements and practices under s.397 of the 2000 Act and Part 7 of the Financial Services Act 2012;
- suspected *insider dealing* under of Part V of the Criminal Justice Act 1993;
- suspected contraventions of the general prohibition under s.19 of the 2000 Act and related offences;
- suspected offences under various other provisions of the 2000 Act (see below);
- suspected breaches of Part VI of the Act, of *Part 6 rules* or the *prospectus rules* or a provision that was otherwise made in accordance with the *Prospectus Directive*.
- suspected contraventions of the *Prospectus Regulation*, the *PR Regulation*, the *Prospectus RTS Regulation* and suspected breaches of Part VI of the Act, of *Part 6 rules* or the *prospectus rules*.

The FCA's powers of information gathering and investigation are set out in Part XI of the 2000 Act and in s.97 in relation to its Part VI functions.

App3.1.4

The FCA has the power to take the following enforcement action:

- discipline authorised firms under Part XIV of the 2000 Act and approved persons and other individuals under s.66 of the 2000 Act;
- impose penalties on persons that perform *controlled functions* without approval under s.63A of the 2000 Act;
- impose civil penalties under s.123 of the 2000 Act;
- temporarily prohibit an individual from exercising management functions in *MiFID investment firms* or from dealing in *financial instruments* on their own account or on the account of a third party, under s.123A(2) of the 2000 Act;
- temporarily prohibit an individual from making a bid, on his or her own account or the account of a third party, directly or indirectly, at an auction conducted by a *recognised auction platform* under s.123A(2) of the 2000 Act;
- permanently prohibit an individual from exercising management functions in *MiFID investment firms* under s.123A(3) of the 2000 Act;
- suspend the permission of an *authorised person* or impose limitations or other restrictions in relation to the carrying on of a *regulated activity* by an *authorised person* under s.123B of the 2000 Act;
- prohibit an individual from being employed in connection with a *regulated activity*, under s.56 of the 2000 Act;
- apply to Court for *injunctions* (or interdicts) and other orders against persons contravening relevant requirements (under s.380 of the 2000 Act) or engaging in *market abuse* (under s.381 of the 2000 Act);
- petition the court for the winding up or administration of companies, and the bankruptcy of individuals, carrying on *regulated activities*;
- apply to the court under ss.382 and 383 of the 2000 Act for restitution orders against persons contravening relevant requirements or persons engaged in *market abuse*;
- require restitution under s.384 of the 2000 Act of profits which have accrued to authorised persons contravening relevant requirements or persons engaged

in *market abuse*, or of losses which have been suffered by others as a result of those *breaches*;

- (except in Scotland) prosecute certain offences, including under the Money Laundering Regulations 2007, the Transfer of Funds (Information on the Payer) Regulations 2007, Part V Criminal Justice Act 1993 (insider dealing), Part 7 of the Financial Services Act 2012 and various offences under the 2000 Act including (Note: The *FCA* may also prosecute any other offences where to do so would be consistent with meeting any of its statutory objectives):

carrying on *regulated activity* without authorisation or exemption, under s.23;

- making false claims to be authorised or exempt, under s.24;
- promoting investment activity without authorisation, under s.25;
- breaching a prohibition order, under s.56;
- failing to co-operate with or giving false information to *FCA* appointed investigators, under s.177;
- failing to comply with provisions about influence over authorised persons, under s.191;
- making misleading statements and engaging in misleading practices, under s.397;
- misleading the *FCA*, under s.398;
- various offences in relation to the *FCA*'s Part VI function;
- Fine, issue public censures, suspend or cancel listing for breaches of the Listing Rules by an issuer; and
- Issue public censures or cancel a sponsor's approval.

3.2 BIS

App3.2.1 The Secretary of State for Business, Innovation and Skills exercises concurrently with the *FCA* those powers and functions marked with an asterisk in ■ App 3.1.3 above. The investigation functions are undertaken by Companies Investigation Branch (CIB) and the prosecution functions by the Legal Services Directorate.

App3.2.2 The principal activities of CIB are, however, the investigations into the conduct of companies under the Companies Acts. These are fact-finding investigations but may lead to follow-up action by CIB such as petitioning for the winding up of a company, disqualification of directors of the company or referring the matter to the Solicitors Office for prosecution. CIB may also disclose information to other prosecution or regulatory authorities to enable them to take appropriate action under their own powers and functions. Such disclosure is, however, strictly controlled under a gateway disclosure regime.

App 3.2.3 The Solicitors Office advises on investigation work carried out by CIB and undertakes criminal investigations and prosecutions in respect of matters referred to it by CIB, the Insolvency Service or other directorates of BIS or its agencies.

3.3 SFO

App 3.3.1 The aim of the SFO is to contribute to:

- reducing fraud and the cost of fraud;
- the delivery of justice and the rule of law;
- maintaining confidence in the UK's business and financial institutions.

App 3.3.2 Under the Criminal Justice Act 1987 the Director of the SFO may investigate any suspected offence which appears on reasonable grounds to involve serious or complex fraud and may also conduct, or take over the conduct of, the prosecution of any such offence. The SFO may investigate in conjunction with any other person with whom the Director thinks it is proper to do so; that includes a police force (or the FCA or any other regulator). The criteria used by the SFO for deciding whether a case is suitable for it to deal with are set out in App 3.3.3.

App 3.3.3 The key criterion should be that the suspected fraud is such that the direction of the investigation should be in the hands of those who would be responsible for any prosecution.

The factors that are taken into account include:

- whether the amount involved is at least £1 million (this is simply an objective and recognisable signpost of seriousness and likely public concern rather than the main indicator of suitability);
- whether the case is likely to give rise to national publicity and widespread public concern. That includes those involving government bodies, public bodies, the governments of other countries and commercial cases of public interest;
- whether the case requires highly specialist knowledge of, for example, stock exchange practices or regulated markets;
- whether there is a significant international dimension;
- whether legal, accountancy and investigative skills need to be brought together; and
- whether the case appears to be complex and one in which the use of Section 2 powers might be appropriate.

3.4 CPS

- App3.4.1** The CPS has responsibility for taking over the conduct of all criminal proceedings instituted by the police in England and Wales. The CPS may advise the police in respect of criminal offences. The CPS prosecutes all kinds of criminal offences, including fraud. Fraud cases may be prosecuted by local CPS offices but the most serious and complex fraud cases will be prosecuted centrally.

3.5 ACPO and ACPOS

- App3.5.1** ACPO represents the police forces of England, Wales, and Northern Ireland. ACPO represents the police forces of Scotland.

3.6 COPFS

- App3.6.1** The investigation and prosecution of crime in Scotland is the responsibility of the Lord Advocate, who is the head of the COPFS, which comprises Procurators Fiscal and their Deputies, who are answerable to the Lord Advocate. The Procurator Fiscal is the sole public prosecutor in Scotland, prosecuting cases reported not only by the police but all regulatory departments and agencies. All prosecutions before a jury, both in the High Court of Justiciary and in the Sheriff Court, run in the name of the Lord Advocate; all other prosecutions run in the name of the local Procurator Fiscal. The Head Office of the Procurator Fiscal Service is the Crown Office and the Unit within the Crown Office which deals with serious and complex fraud cases and with the investigation of cases of interest or concern to the Financial Services Authority is the National Casework Division: the remit of this Unit is directly comparable to that of the Serious Fraud Office.

3.7 The PPS

- App3.7.1** The PPS is responsible for the prosecution of all offences on indictment in Northern Ireland, other than offences prosecuted by the Serious Fraud Office. The PPS is also responsible for the prosecution of certain summary offences, including offences reported to it by any government department.

