

Chapter 2

Information gathering by the FCA or PRA on its own initiative

2.1 Application and purpose

Application

- 2.1.1 **R** The application of this chapter is the same as the application of *Principle 11* (Relations with regulators).
- 2.1.2 **G** ■ PRIN 3 (Rules about application) specifies to whom, to what and where *Principle 11* applies.
- 2.1.2A **G** *CBTL firms* are subject to a duty to deal with the *FCA* in an open and co-operative manner under article 18(1)(d) of the *MCD Order*. ■ SUP 2.3 applies to *CBTL firms* in relation to complying with that duty as though:
- (1) a reference to *firm* included a reference to a *CBTL firm*;
 - (2) a reference to the *regulatory system* were a reference to the provisions of the *MCD Order*, rules, directions and guidance applicable to *CBTL firms*;
 - (3) a reference to *Principle 11* were a reference to the duty imposed by article 18(1)(d) of the *MCD Order*;
 - (4) a reference to the *appropriate regulator's* functions under the *Act* were a reference to the *FCA's* functions under Part 3 of the *MCD Order*;
 - (5) a reference to ■ SUP 12.5.3G were a reference to ■ SUP 12.5.3AG;
 - (6) a reference to *material outsourcing* were a reference to *outsourcing* services of such importance that weakness, or failure, of the services would cast serious doubt upon the *CBTL firm's* continuing satisfaction of any condition for registration in article 8(2) or 8(3) of the *MCD Order*; and
 - (7) the *rules* were guidance in the same terms but with the word "must" replaced with the word "should".

Purpose

- 2.1.3 **G** Achieving the *regulatory objectives* involves the *FCA* informing itself of developments in *firms* and in markets. The *Act* requires the *FCA* to maintain arrangements for supervising *authorised persons* (section 1L(1)). The *Act* also requires the *FCA* to take certain steps to cooperate with other relevant

bodies and regulators (section 354A). For these purposes, the *FCA* needs to have access to a broad range of information about a *firm's* business.

- 2.1.4 **G** The *FCA* receives the information in **■ SUP 2.1.3 G** through a variety of means, including notifications by *firms* (see **■ SUP 15**) and regular reporting by *firms* (see **■ SUP 16**). This chapter is concerned with the methods of information gathering that the *FCA* may use on its own initiative in the discharge of its functions under the *Act*. This chapter does not deal with the information gathering powers that the *FCA* has under the *Unfair Terms Regulations* and the *CRA*. These are dealt with in *UNFCOG*.
- 2.1.5 **G** Part XI of the *Act* (Information Gathering and Investigations) gives the *FCA* statutory powers, including:
- (1) to require the provision of information (see sections 165 and **■ EG 3**);
 - (2) to require reports from *skilled persons* (see section 166 and **■ SUP 5**);
 - (3) to appoint investigators (see sections 167, 168 and 169 of the *Act* and **■ EG 3**); and
 - (4) to apply for a warrant to enter premises (see section 176 of the *Act* and **■ EG 4**).
- 2.1.6 **G** The *FCA* prefers to discharge its functions by working in an open and cooperative relationship with *firms*. The *FCA* will look to obtain information in the context of that relationship unless it appears that obtaining information in that way will not achieve the necessary results, in which case it will use its statutory powers. The *FCA* has exercised its *rule-making* powers to make *Principle 11* which requires that a *firm* must deal with its regulators in an open and cooperative way, and must disclose to the *FCA* appropriately anything relating to the *firm* of which the *FCA* would reasonably expect notice.
- 2.1.7 **G** The *FCA* operates in the context of the *Act* and the general law. The purpose of **■ SUP 2.2** is to explain how certain provisions of the *Act* and the general law are relevant to the *FCA's* methods of information gathering described in **■ SUP 2.3** and **■ SUP 2.4**.
- 2.1.8 **G** The purpose of **■ SUP 2.3** is to amplify *Principle 11* in the context of information gathering by the *FCA* on its own initiative in the discharge of its functions under the *Act*. **■ SUP 2.3** therefore sets out, in *guidance on Principle 11* and in *rules*, how the *FCA* expects *firms* to deal with the *FCA* in that context, including the steps that a *firm* should take with a view to ensuring that certain connected persons should also cooperate with the *FCA*.
- 2.1.9 **G** The purpose of **■ SUP 2.4** is to explain a particular method of information gathering used by the *FCA*, known as "mystery shopping". Information about how a *firm* sells products and services can be very difficult to obtain, and the purpose of this method is to obtain such information from individuals who approach a *firm* in the role of potential retail *consumers* on

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the *FCA's* initiative. The *FCA* may seek information about particular issues or the activities of individual *firms* by means of mystery shopping.

The purpose of applying the provisions set out in ■ SUP 2.1.2AG to *CBTL firms* is to amplify the duty of *CBTL firms* to deal with the *FCA* in an open and co-operative manner under article 18(1)(d) of the *MCD Order*.

2.2 Information gathering by the appropriate regulator on its own initiative: background

Link to the statutory information gathering and investigation powers

2.2.1 **G** Breaching *Principle 11*, or the *rules* in this chapter, makes a *firm* liable to regulatory sanctions, including discipline under Part XIV of the *Act* (Disciplinary Measures), and may be relevant to the use of the *appropriate regulator's* other powers, including the statutory information gathering and investigation powers (see further ■ PRIN 1.1.7 G to ■ PRIN 1.1.9 G). But, unlike a breach of a requirement imposed under the statutory powers listed in ■ SUP 2.1.5 G, a breach of *Principle 11* or a *rule*:

- (1) is not a criminal offence; and
- (2) cannot lead to a *person* being treated as if in contempt of court (see section 177 of the *Act* (Offences)).

2.2.2 **G** Neither *Principle 11* nor ■ SUP 2.3.5 R (1) (Access to premises) enable the *appropriate regulator* to force access to premises.

Banking confidentiality and legal privilege

2.2.3 **G** The *FCA* would not normally seek to gather information using the methods described in ■ SUP 2.3 or ■ SUP 2.4 in a situation where the *FCA* could not have obtained it under the powers in Part XI of the *Act* (Information Gathering and Investigations). In particular, the limitations in the following sections of the *Act* are relevant to this chapter:

- (1) section 175(5) (Information and documents: supplementary powers) under which no *person* may be required under Part XI of the *Act* (Information Gathering and Investigations) to disclose information or produce a document subject to banking confidentiality (with exceptions); the *FCA* would not normally seek such information using the methods described in ■ SUP 2.3 or ■ SUP 2.4; and
- (2) section 413 (Protected items), under which no *person* may be required under the *Act* to produce, disclose or permit the inspection of *protected items*; a *firm* would not breach *Principle 11* or the *rules* in this chapter by not producing such items.

Confidentiality of information

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When the *FCA* obtains confidential information using the methods of information gathering described in ■ SUP 2.3 or ■ SUP 2.4, it is obliged under Part XXIII of the *Act* (Public Record, Disclosure of Information and Co-operation) to treat that information as confidential. The *FCA* will not disclose confidential information without lawful authority, for example if an exception applies under the Financial Services and Markets Act 2000 (Disclosure of Confidential Information) Regulations 2001 (SI 2001/2188) or with the consent of the *person* from whom that information was received and (if different) to whom the information relates.

Admissibility of information in proceedings

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Information obtained by the *FCA* using the methods described in ■ SUP 2.3 and ■ SUP 2.4 is admissible in evidence in any proceedings, so long as it complies with any requirements governing the admissibility of evidence in the circumstances in question.

2.3 Information gathering by the FCA on its own initiative: cooperation by firms

Introduction: Methods of information gathering requiring cooperation

2.3.1 **G** The *FCA* uses various methods of information gathering on its own initiative which require the cooperation of *firms*:

- (1) Visits may be made by representatives or appointees of the *FCA*. These visits may be made on a regular basis, on a sample basis, for special purposes such as theme visits (looking at a particular issue across a range of *firms*), or when the *FCA* has a particular reason for visiting a *firm*. Appointees of the *FCA* may include persons who are not *FCA* staff, but who have been appointed to undertake particular monitoring activities for the *FCA* (paragraph 6(2) of Schedule 1 to the *Act*). The *FCA appropriate regulator*
- (2) The *FCA* may seek meetings at the *FCA's appropriate regulator's* offices or elsewhere.
- (3) The *FCA* may seek information or request *documents* by telephone, at meetings or in writing, including by electronic communication.

2.3.2 **G** The *FCA* expects to request meetings or access to business premises during reasonable business hours. The *FCA* also normally expects to be able to give reasonable notice to a *firm* or connected person when it seeks information, *documents*, meetings or access to business premises. On rare occasions, however, the *FCA* may seek access to premises without notice. The prospect of unannounced visits is intended to encourage *firms* to comply with the requirements and standards under the *regulatory system* at all times.

Access to a firm's documents and personnel

2.3.3 **G** In complying with *Principle 11*, the *FCA* considers that a *firm* should, in relation to the discharge by the *FCA* of its functions under the *Act*:

- (1) make itself readily available for meetings with representatives or appointees of the *FCA* as reasonably requested;
- (2) give representatives or appointees of the *FCA* reasonable access to any records, files, tapes or computer systems, which are within the *firm's* possession or control, and provide any facilities which the representatives or appointees may reasonably request;

- (3) produce to representatives or appointees of the *FCA* specified *documents*, files, tapes, computer data or other material in the *firm's* possession or control as reasonably requested;
- (4) print information in the *firm's* possession or control which is held on computer or on microfilm or otherwise convert it into a readily legible *document* or any other record which the *FCA* may reasonably request;
- (5) permit representatives or appointees of the *FCA* to copy *documents* or other material on the premises of the *firm* at the *firm's* reasonable expense and to remove copies and hold them elsewhere, or provide any copies, as reasonably requested; and
- (6) answer truthfully, fully and promptly all questions which are reasonably put to it by representatives or appointees of the *FCA*.

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In complying with *Principle 11*, the *FCA* considers that a *firm* should take reasonable steps to ensure that the following *persons* act in the manner set out in ■ SUP 2.3.3 G:

- (1) its *employees*, agents and *appointed representatives*; and
- (2) any other members of its *group*, and their *employees* and agents.

(See also, in respect of *appointed representatives*, ■ SUP 12.5.3 G (2)).

Access to premises

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- (1) A *firm* must permit representatives of the *FCA* or *persons* appointed for the purpose by the *FCA* to have access, with or without notice, during reasonable business hours to any of its business premises in relation to the discharge of the *FCA's* functions under the *Act* or its obligations under the *short selling regulation*.
- (2) A *firm* must take reasonable steps to ensure that its agents, suppliers under *material outsourcing* arrangements and *appointed representatives* permit such access to their business premises. (See also, in respect of *appointed representatives*, ■ SUP 12.5.3 G (2)).

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The *FCA* normally expects to give reasonable notice of a visit (See ■ SUP 2.3.2 G).

Suppliers under material outsourcing arrangements

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- (1) A *firm* must take reasonable steps to ensure that each of its suppliers under *material outsourcing* arrangements deals in an open and cooperative way with the *FCA* in the discharge of its functions under the *Act* in relation to the *firm*.
- (2) The requirement in (1) does not apply to a *regulated benchmark administrator* where the *material outsourcing* arrangements relate to the carrying on of the *regulated activity* of *administering a benchmark*.

- 2.3.8 G The cooperation that a *firm* is expected to procure from such suppliers is similar to that expected of the *firm*, in the light of the *guidance* in ■ SUP 2.3.3 G to ■ SUP 2.3.4 G, but does not extend to matters outside the scope of the *FCA's* functions in relation to the *firm*. ■ SUP 2.3.5 R (2) also requires a *firm* to take reasonable steps regarding access to the premises of such suppliers.

- 2.3.9 G When a *firm* appoints or renews the appointment of a supplier under a *material outsourcing* arrangement, it should satisfy itself that the terms of its contract with the supplier require the supplier to give the *FCA* access to its premises as described in ■ SUP 2.3.5 R (2), and to cooperate with the *FCA* as described in ■ SUP 2.3.7 R. The *FCA* does not consider that the 'reasonable steps' in ■ SUP 2.3.7 R would require a *firm* to seek to change a contract, already in place either when that *rule*: (1) was made by the *FCA* on 21 June 2001; or (2) was designated by the *FCA*, until renewal of the contract.

- 2.3.10 G The *FCA* will normally seek information from the *firm* in the first instance, but reserves the right to seek it from a supplier under a *material outsourcing* arrangement if the *FCA* considers it appropriate.

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 - (1) ■ SUP 2.3.7R(2) provides that the requirement in ■ SUP 2.3.7R(1) does not apply to a *regulated benchmark administrator* where the *material outsourcing* arrangements relate to the carrying on of the *regulated activity of administering a benchmark*.
 - (2) That is because article 10(3)(f) of the *benchmarks regulation* imposes equivalent requirements on *firms* which outsource functions in relation to *administering a benchmark*.

Information requested on behalf of other regulators

- 2.3.11 G The *FCA* may ask a *firm* to provide it with information at the request of or on behalf of other regulators to enable them to discharge their functions properly. Those regulators may include *overseas regulators* or the *Takeover Panel*. The *FCA* may also, without notifying a *firm*, pass on to those regulators information which it already has in its possession. The *FCA's* disclosure of information to other regulators is subject to the obligation described in ■ SUP 2.2.4 G (Confidentiality of information).

- 2.3.12A G In complying with *Principle 11*, the *FCA* considers that a *firm* should cooperate with it in providing information for other regulators. Sections 169 (Investigations etc. in support of overseas regulator) of the *Act* gives the *FCA* certain statutory powers to obtain information and appoint investigators for *overseas regulators* if required (see ■ DEPP 7 and ■ EG 3).

2.4 'Mystery shopping'

- 2.4.1** **G** Representatives or appointees of the *FCA* (which may include individuals engaged by a market research firm) may approach a *firm*, its agents or its *appointed representatives* in the role of potential retail *consumers*. This is known as 'mystery shopping'.
- 2.4.2** **G** The *FCA* uses mystery shopping to help it protect *consumers*. This may be by seeking information about a particular practice across a range of *firms* (■ SUP 2.4.3 G (1)) or the practices of a particular *firm* (■ SUP 2.4.3 G (2)). One of the risks *consumers* face is that they may be sold products or services which are inappropriate to them. A problem in protecting *consumers* from this risk is that it is very difficult to establish after the event what a *firm* has said to a 'genuine' *consumer* in discussions. By recording what a *firm* says in discussions with a 'mystery shopper', the *FCA* can establish a *firm's* normal practices in a way which would not be possible by other means.
- 2.4.3** **G** The *FCA* may carry out mystery shopping:
- (1) together with a programme of visits to obtain information about a particular practice, looking at a particular issue across a range of *firms*, when the *FCA* may advise the *firms* of the issues beforehand; the practice being scrutinised may be that of *firms* or a class of *firms* in carrying on *regulated activities* or *ancillary activities* or in *communicating* or *approving financial promotions*;
 - (2) together with focused visits (concentrating on particular aspects of a *firm's* business) to obtain information about the practices of a *firm*; these practices may be in carrying on *regulated activities* or *ancillary activities* or in *communicating* or *approving financial promotions* when the *FCA* has particular concerns about those practices;
 - (3) using recording devices, telephonic or other communications; the *FCA* may monitor and store the contents of the materials obtained by these devices or communications.
- 2.4.4** **G** Telephone calls and meetings held during mystery shopping will be recorded. The *FCA* expects that any mystery shopping it arranges will be conducted in accordance with the Market Research Society Code of Practice.
- 2.4.5** **G** The *FCA* may use the information it obtains from mystery shopping in support of both its supervisory functions and its enforcement functions. This

includes sharing any information so obtained with *firms* and *approved persons*.

