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

2.1.10 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

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)).

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

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

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

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 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 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 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;
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(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.

2.3.4 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

2.3.5 (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)).

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

Suppliers under material outsourcing arrangements

2.3.7 (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.
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.

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.

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.

(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

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).

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 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 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 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 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 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.