

THE EXTENT OF THE FCA'S INFORMATION GATHERING AND INVESTIGATION POWERS



William Hibbert

FCA Powers:

- to require the provision of information
- to require reports from skilled persons
- to appoint investigators
- to apply for a warrant to enter premises
- to compel interviews

FCA Handbook

- PRIN (Principles)
- SUP (Supervision)
- The Enforcement Guide (EG).
- DEPP (Decision Procedure and Penalties Manual)
- UNFCOG (Unfair terms in consumer contracts)

Principle 11: Relations with regulators

A firm must deal with its regulators in an open and cooperative way, and must disclose to the appropriate regulator appropriately anything relating to the firm of which that regulator would reasonably expect notice.

SUP 15.6.1R

A firm must take reasonable steps to ensure that all information is:

- (1) factually accurate or, in the case of estimates and judgments, fairly and properly based after appropriate enquiries have been made by the firm; and
- (2) complete, in that it should include anything of which the FCA would reasonably expect notice.

SUP 15.6.4R requires errors to be corrected and explained

Section 398 FSMA

Offence for a firm knowingly or recklessly to provide the FCA with information which is false or misleading in a material particular in purported compliance with the rules or any other requirement imposed by or under the Act.

An offence by a body corporate, partnership or unincorporated association may be attributed to an officer or certain other persons (section 400 FSMA)

SUP 15.7.10R

Any timetables set by the FCA are strict and a failure to comply a breach of the rules.

EG at 4.15 to 4.16

The FCA expects persons to respond to information and document requests in a timely manner to appropriate deadlines. Once it has formally issued a requirement the FCA will not usually agree to an extension of time unless compelling reasons are provided to support an extension request.

Catch 22

Inability to comply with requirements imposed by the FCA is a breach of Threshold Conditions (COND 2.4.1A (4)(b))

Procedures based on “cooperation”

- Visits.
 - The regulator will need to be given access to a firm's documents, personnel and business premises.
- Meetings
 - At the regulator's offices or elsewhere.
- Informal requests for documents/information
 - The regulator may seek information or request documents by telephone, at meetings or in writing, including by electronic communication

Limits

- Section 175(5) FSMA: Document subject to banking confidentiality (with exceptions);
- Section 413 (Protected items, essentially legally privileged items),

A firm would not breach Principle 11 or the rules in this chapter by not producing such items.

Confidentiality: The FCA's duty of confidentiality (s,348 FSMA) applies. The FCA must not disclose information which is confidential/received for the purposes of its functions under FSMA, unless:

- the information is already lawfully publicly available
- the FCA has consent of relevant persons
- the information is anonymised or aggregated, or
- a 'gateway' permitting disclosure applies.

Principle 11/SUP 2.3.5R

The firm must permit the FCA to have access to the firm's premises during reasonable business hours with or without notice.



Obligations on the firm on an informal request

SUP 2.3.3G (all subject to a requirement of reasonableness)

- make itself readily available for meetings;
- give access to any records, files, tapes or computer systems, which are within the firm's possession or control, and provide any facilities requested;
- produce specified documents, files, tapes, computer data or other material in the firm's possession or control;
- 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;
- permit the copying of documents or other material on the premises at the firm's reasonable expense and to remove copies and hold them elsewhere, or provide any copies,
- answer truthfully, fully and promptly all questions put to it

SUP 2.3.3 to 2.3.7

A firm must take reasonable steps to ensure that not only its employees cooperate but also

- agents,
- appointed representatives
- any other members of its group, and their employees and agents
- third party outsourcers

Principle 11 requires the volunteering of “anything relating to the firm of which that regulator would reasonably expect notice”.

Amplified by SUP 15, which requires notification of certain matters immediately a firm becomes aware, or has information which reasonably suggests, that any of the matters have occurred, may have occurred or may occur in the foreseeable future

Sup 15: Some of the matters that must be volunteered

SUP 15.3.1R

- the firm failing to satisfy one or more of the threshold conditions
- any matter which could have a significant adverse impact on the firm's reputation
- any matter which could affect the firm's ability to continue to provide adequate services to its customers and which could result in serious detriment to a customer

SUP 15.3.11R

- a significant breach of a rule (which includes a Principle) or Statement of Principle;
- a significant breach of any requirement imposed by the CCA or by regulations or an order made under the CCA,
- a breach of any requirement imposed by the Act or by regulations or an order made under the Act by the Treasury;
- the bringing of a prosecution for, or a conviction of, any offence under the Act or the CCA(*)
by (or as regards (*) against) the firm or any of its directors, officers, employees, approved persons, or appointed representatives or, where applicable, tied agents.

SUP 15.3.15R

- civil proceedings are brought against the firm and the amount of the claim is significant
- an action for damages is brought against the firm under sections 71 or section 138D
- an investigation has started or disciplinary measures or sanctions imposed by any statutory or regulatory authority, professional organisation or trade body
- the firm is prosecuted for, or convicted of, any offence involving fraud or dishonesty

SUP 2.4

By recording what a firm says in discussions with a 'mystery shopper', the FCA hopes to establish a firm's normal practices in a way which would not be possible by other means.

Section 165 FSMA

FCA can require authorised persons to provide information or documents that are “reasonably required” in connection with the exercise of its statutory powers.

- “Documents” includes information recorded in any form and, in relation to information recorded otherwise than in legible form, references to its production include producing a copy of the information in legible form or in a form from which it can readily be produced in visible and legible form (FSMA section 417)
- “Information” is not defined

There does not need to be a formal investigation or even a regulatory concern about the firm asked to provide information.

Who can be required to provide information or documents?

Any person who is, or was, an authorised person and (sections 165(7) and (11)), any person who is connected with an authorised person - “A” - which means any person who is or has been:

- A member of A’s group.
- A controller of A.
- Any other member of a partnership of which A is a member.

In relation to A, a person who is or has been an officer or manager of A or an agent of A or of a parent undertaking of A.

Documents/information protected from production

Section 175(5) FSMA

Documents and information in respect of which duties of banking confidentiality are owed unless:

- The person to whom the request is made is the person, or a member of the group of the person, under investigation;
- The person to whom the duty of confidentiality is owed is the person under investigation or a member of that person's group;
- The person to whom the duty is owed consents; or
- The requirement is specifically authorised by the investigating authority

Section 413 FSMA

Legal privilege

A “reasonable” period of time should be allowed by the FCA for compliance

In the case where an officer attends with a requirement for information or documents, he can require them “without delay” (section 165(3) FSMA).

Section 177 FSMA

- Failure to comply without reasonable excuse may be treated by the Court as a contempt of Court punishable by an unlimited fine and/or a prison term.
- Intentionally destroying/concealing/falsifying documents which are or are suspected to be relevant to the investigation is an offence carrying a prison term and/or fine.
- Deliberately or recklessly providing information in response to an information requirement which is false or misleading in a material particular is an offence carrying a prison term and/or fine.

- Where the FCA has power to require a person to produce a document but it appears that the document is in the possession of a third person, that power may be exercised in relation to the third person (section 175(1) FSMA).
- Further there is power to require statements of belief as to where a document is (section 175 FSMA)
- As well as the firm itself, current and former officers, employees, lawyers accountants (and others) can be required by section 175(2) FSMA to provide explanations of any documents.

FCA can require a person to provide it with a skilled person report where it could have required information or documents under section 165 or can itself appoint the skilled person directly.

In either case, the firm will be required to pay for the report

SUP 5.3.1G

- for diagnostic purposes, to identify, assess and measure risks;
- for monitoring purposes, to track the development of identified risks, wherever these arise;
- in the context of preventative action, to limit or reduce identified risks and so prevent them from crystallising or increasing; and
- for remedial action, to respond to risks when they have crystallised.

SUP 5 Annex 1 gives examples of circumstances in which the FCA may use the skilled persons tool.

Skilled persons report

- Appointment will be subject to discussions (SUP 5.4.2G)
- Certain provisions to be included in the contract for the skilled person (SUP 5.5.1R and 5R)
- Firm must provide all reasonable assistance to the skilled person (SUP 5.5.9R) This includes:
 - Giving access to the firm's systems and records; and
 - Providing such information and explanations as the skilled person reasonably considers necessary or desirable for the performance of his duties and permitting the skilled person to obtain such information directly from the firm's auditor.
- The firm will normally have an opportunity to provide written comments on the draft report. SUP 5.4.10G
- Skilled person is bound by the duty of confidentiality imposed on the FCA and the protection of banking confidentiality and legal privilege also apply. But the report itself will not be a privileged document

Section 176 FSMA

- A person on whom an information requirement has been imposed fails to comply with it in whole or in part.
- There are reasonable grounds for believing that were an information requirement to be imposed, relevant material would be destroyed, removed or tampered with.

Memorandum of understanding with police setting out best practice

<https://www.fca.org.uk/static/documents/mou/mou-association-chief-police-officers.pdf>.

Warrant entitles a police officer, and any accompanying investigator, to:

- enter the premises
- search the premises
- take possession of any documents or information that appear to be of the kind in respect of which the warrant was issued
- Take steps to preserve or prevent interference with the relevant documents or information
- Take copies of relevant documents or information
- Require any person on the premises to provide an explanation of any document or information that appears to be relevant or to state where it might be found
- Use such force as is reasonably necessary.

Owner can apply to the magistrates court for the return of documents and can also bring proceedings for their delivery up, but this latter right is limited to 6 months (section 167A FSMA) is limited to Material taken under a search warrant must be returned within three months unless criminal proceedings are instituted.

Intentionally obstructing the execution of a search warrant is an offence under section 177(6) and carries 3 months' imprisonment and/or a fine of up to £5,000.

Investigators can be appointed under sections 167 and 168 FSMA if it appears to the FCA that

- there is good reason to do so in relation to any aspect of an authorised firm's business or its ownership and control
- there are circumstances to suggest that a regulatory offence or breach, or money laundering or market abuse has been committed, or there is a lack of fitness and propriety on the part of one or more individuals.

Section 169 FSMA allows investigators to be appointed to assist foreign regulators

The FCA is required to notify the person who is the subject of the investigation except

- the subject of an investigation into insider dealing, market abuse, breach of the general prohibition or breach of the rules on financial promotion (section 168(2)) does not have to be notified at the outset]
- the subject of an investigation under section 168(1) or (4) does not have to be notified if to do so would be likely to result in the investigation being frustrated.

The notification does not have to include details of the scope of the investigation, but the reason for it is given. Usually the FCA will publicise the fact that it has started an investigation.

Compelled interviews and provision of information

Section 171 (and 172(1)) FSMA

An investigator may require the person who is the subject of the investigation or any person connected with the person under investigation

- to attend before the investigator at a specified time and place and answer questions; or
- otherwise to provide such information as the investigator may require.

“Any connected person” means this power extends to those who are or have been partners, managers, employees, appointed representatives, agents, auditors, bankers, actuaries OR SOLICITORS of the firm.

The privilege against self-incrimination does not apply

An investigator may also require any person, including unconnected persons to produce at a specified time and place any specified documents or documents of a specified description.

There is no power to interview unconnected persons unless the investigation is under section 168(1) and (4) in relation to certain criminal and regulatory offences.

A requirement of production or interview may be imposed only so far as the investigator concerned reasonably considers the question, provision of information or production of the document to be **relevant** to the purposes of the investigation.

In the case of third parties it must be “**necessary or expedient**” for the regulator to obtain it from the third party rather than from the subject of the investigation.

- Failure to comply with formal requirements in relation to production or interviews punishable as a contempt of Court on an application to Court by the FCA.
- Failure to cooperate may be treated as a breach of Principles 11 or 4, with the consequent sanctions.



THE CONSUMER CREDIT TEAM

AT

Henderson Chambers
2 Harcourt Buildings
Temple
London EC4Y 9DB

Tel: 020 7583 9020
clerks@hendersonchambers.co.uk
www.hendersonchambers.co.uk