

Principles of Co-operation between the Serious Fraud Office and the Financial Conduct Authority

Introduction

1. The Financial Conduct Authority (FCA) and the Serious Fraud Office (SFO) often need to work together in relation to new investigations, intelligence developments, investigations and prosecutions, conducted by either the FCA and/or the SFO, as well as on matters of common legal or policy interest.
2. This document sets out some high-level 'Principles of Co-operation' which are intended to promote and facilitate the sharing of information between the FCA and SFO to better deliver the objectives of both organisations in these spaces.
3. Both the FCA and the SFO investigate and prosecute relevant offences within their remits as detailed in this document. As such, the FCA and the SFO mutually recognise their independence along with the need to conduct matters in accordance within the ambit of their respective statutory powers and responsibilities.
4. This document is not intended to create any rights, obligations, or legitimate expectations on the SFO or the FCA, or on any other person or third party.
5. Unless otherwise stated, this document complements and is not intended to replace or supersede any agreements relating to specific information exchanges or investigations.
6. The SFO and the FCA are both stakeholders of the National Economic Crime Centre (NECC) and the Joint Money Laundering Intelligence Taskforce (JMLIT). This document is not intended to replace or contradict the extant co-operation between the FCA and the SFO within the multiagency environment of the NECC or the JMLIT nor regulate the sharing of information by the SFO and the FCA with the same.
7. This document replaces the Joint Protocol entered into by the FCA and SFO in May 2014.
8. Information will only be exchanged where it is lawful to do so. The relevant legal basis for exchanging information is detailed within this document.

Role of the FCA

9. The FCA is the single statutory regulator for all financial business in the UK and was established by Financial Services and Markets Act 2000 (FSMA). The FCA's strategic objective is to ensure that the relevant markets function well

and its operational objectives are to secure an appropriate degree of protection for consumers, to protect and enhance the integrity of the UK financial system and to promote effective competition in the interests of consumers. Under FSMA, the FCA has an extensive range of disciplinary, criminal and civil powers to take action against regulated and non-regulated firms and individuals who are failing or have failed to meet the standards we require. The FCA may also prosecute criminal offences where it would be consistent with meeting any of its statutory duties.

10. Under section 354A of FSMA the FCA must take such steps as it considers appropriate to cooperate with other persons, either in the UK or overseas, who have functions similar to the FCA, or in relation to the prevention or detection of financial crime.

Role of the SFO

11. The SFO is a non-ministerial government department established by Criminal Justice Act 1987 (CJA) and its functions and powers are provided for primarily but not exclusively by the CJA. In particular, section 1(3) to (5) of the CJA provide that the SFO may investigate and prosecute cases of 'serious or complex fraud' which includes the offences of bribery and corruption. Under section 1(4) it is also open to the SFO to conduct a joint investigation in conjunction with any other person and this can include other agencies such as the police or FCA.
12. The principal investigative powers of the SFO are provided by section 2 of the CJA, including the power to compel the production of documents and apply for a search warrant. These powers may also be relied on for the purposes of a 'pre-investigation' into certain types of suspected bribery or corruption offences with a foreign element. The SFO operates under the direction of the Director who discharges their functions under the superintendence of the Attorney General.

High level modes of communication

13. Senior leaders from both the SFO and the FCA's Enforcement and Market Oversight Division, will meet on a regular basis, along with others from their respective organisations, to discuss matters of key importance to both organisations relating to strategy, policy and on-going collaboration generally. In addition, they will discuss the status of any on-going investigations being conducted by the SFO and the FCA as appropriate including but not limited to, cases of mutual interest cases where one organisation is assisting the other or any relevant high-profile cases. In such matters, the SFO and FCA will seek to ensure :

- a) the effective and consistent discharge of their functions through co-operation and co-ordinated enforcement action to the extent permitted by law ;
- b) that any enforcement action is proportionate, consistent and targeted ;
- c) the approach to working together is consistent and co-ordinated in relation to relevant investigations and enforcement actions;
- d) decisions about taking enforcement action and by whom are made as early as possible having regard to expertise, knowledge, priorities, powers and the extent of the misconduct.

14. The FCA and SFO will maintain a list of specific contacts at each organisation to facilitate ongoing liaison and sharing of information and intelligence. This list will be reviewed on an ongoing basis as part of regular meetings.

Co-operation around areas of mutual interest

15. The FCA and SFO will notify one another, through the modes of communication above, of any investigation or pre-investigation matter of mutual interest at the earliest opportunity. They will discuss at the outset whether there is a need for a joint investigation or parallel investigation to be commenced. Where the decision is taken to prefer action by only the SFO or FCA, the SFO or FCA will report regularly on the progress of any investigation with a view to keeping this decision under review.
16. The FCA and SFO may conduct a joint investigation in accordance with section 1(4) of the CJA as appropriate. In this case there will be a single case team.
17. The FCA and SFO may also conduct parallel investigations whereby each organisation has a separate but related investigation.
18. Upon confirmation of the parallel investigations, the SFO and FCA investigation teams will scope their respective investigations in consultation with one another and a record of any decision will be kept. Where such matters arise that may alter the scope of one or other investigation, the SFO and FCA will notify one another in as timely a manner as possible and escalate as appropriate.
19. The SFO and FCA investigation teams will set an appropriate schedule for updating one another on progress and, at a minimum, agree to notify one another of any significant developments in their respective investigations and/or modification to their investigation plans in a timely manner. Updates may include, but not be limited to: plans to notify subjects of an investigation, interview key witnesses, require significant volumes of documents as part of the investigation, execute search warrants, the institution of proceedings and related hearings, and any plans to otherwise dispose of a matter. In particular,

regard should be had to any other significant matters which may have implications for, or prejudice, the investigation of the other.

20. In the case of a joint or parallel investigation, arrangements may be entered into from time to time by the FCA and the SFO for the purpose of dealing with specific matters outside the terms of this document and where operationally required to help co-ordinate decisions or manage particular aspects of a case.
21. The FCA and SFO will work together on the basis that any prejudice to criminal proceedings will be managed. However, in the event any actions to be taken by the FCA or SFO might be perceived to prejudice an investigation or future proceedings by the other, these matters will be discussed to determine what action should be taken and by whom.
22. The FCA will consult with the SFO in matters of mutual interest before settling a case or proceeding to Warning Notice stage, to allow the SFO to consider whether to ask the FCA to stay proceedings or forgo settling at that time.
23. The SFO may request in writing that the FCA stay the regulatory process or does not settle matters, following issue of a Warning Notice. Such a request will specify the reasons for the request and timescale for the stay as appropriate. Requests should be addressed to the FCA's Director of Enforcement and Market Oversight and will be considered on a case-by-case basis. Where necessary, such as when a request may be refused, the matter will be escalated to the Director of the SFO.

Information sharing generally

24. To the extent permitted under applicable legal and procedural restrictions on the disclosure of information, the FCA and SFO will exchange as appropriate information and documents relevant to the discharge one another's functions, proactively or upon request.
25. The exchange of information between the FCA and the SFO will be compliant with the law, including, but not limited to the relevant provisions of:
 - a. The UK General Data Protection Regulation ('UK GDPR'), the Data Protection Act 2018 and any successor or analogous legislation;
 - b. Section 3(5) of the Criminal Justice Act 1987 ('CJA') for information provided by the SFO; and
 - c. Sections 348 and section 349 of FSMA for information provided by the FCA.

The FCA – Section 348 of FSMA and relevant gateways

26. Section 348 of FSMA provides that any information relating to the business or affairs of any person received by the FCA for the purposes of, or in the discharge of its functions, constitutes ‘confidential information’ and is subject to statutory restrictions on disclosure. The FCA and any person obtaining confidential information cannot disclose it without the consent of the person from whom the FCA obtained the information and, if different, the person to whom it relates, except where the legislation permits disclosure through one of the statutory ‘gateways’ as provided by the Financial Services and Markets Act 2000 (Disclosure of Confidential Information) Regulations 2001.
27. Any confidential information disclosed by the FCA to the SFO will be made in accordance with a statutory gateway. Statutory gateways are permissive not mandatory. Generally, the relevant gateway will be pursuant to:
- a. Regulation 3 of the Disclosure Regulations, which permits the FCA to disclose information for the purposes of enabling or assisting the FCA to discharge its public functions; and/or
 - b. Regulation 4 of the Disclosure Regulations which permits the FCA to disclose information for the purposes of any criminal investigation/criminal proceedings or for the purpose of initiating or bringing to an end any such investigation or proceedings, or facilitating a determination of whether it or they should be initiated or brought to an end.
28. Any disclosure of information by the FCA to the SFO pursuant to subparagraphs a) and b) above will result in the same duty of confidentiality being attached to the information when it is held by the SFO.
29. Nevertheless, under section 3(3) of the CJA, any information subject to an obligation of secrecy by or under any enactment other than an enactment contained in the Taxes Management Act 1970, shall not have effect to prohibit the disclosure of that information to any person in his capacity as a member of the SFO, but any information disclosed by virtue of this subsection may only be disclosed by a member of the SFO for the purposes of any prosecution in England and Wales, Northern Ireland or elsewhere, or in order to comply with a requirement imposed under paragraph 7 of the Schedule to the Crown Prosecution Services Inspectorate Act 2000, and may only be disclosed by such member if they are designated by the Director for the purposes of this subsection.

The SFO – Section 3 CJA and relevant gateways

30. Section 3(5) of the CJA allows for information obtained by any person in their capacity as a member of the SFO to be disclosed to the FCA for the purposes of a criminal investigation or criminal proceedings; or insofar as the FCA (or a person appointed by it) constitutes a competent authority. This is subject to the caveat that there must be no statutory prohibition on disclosure.
31. So far as it is relevant, section 3(6) of the CJA provides that the following are competent authorities for the purposes of subsection (5):
- a person appointed to conduct an investigation under:
 - (i) section 167 of FSMA (general investigations),
 - (ii) section 168 of FSMA (investigations in particular cases),
 - (iii) section 169(1)(b) of FSMA (investigation in support of overseas regulator),
 - (iv) section 284 of FSMA (investigations into affairs of certain collective investment schemes), or
 - (v) regulations made as a result of section 262(2)(k) of FSMA (investigations into open-ended investment companies); and
 - anybody having supervisory, regulatory or disciplinary functions in relation to any profession or any area of commercial activity.
32. Where the SFO conducts a joint investigation in conjunction with the FCA in accordance with section 1(4) of the CJA, it will not be necessary to rely on section 3(5) in order to share confidential information concerning the case with FCA colleagues as such sharing will constitute an internal transfer within a single case team rather than a disclosure to an external third party.
33. In addition to the above, the FCA and SFO are also subject to the statutory constraints on the disclosure of inside information under the UK Market Abuse Regulation.
34. Inside information is information which, if it were made public, would be likely to have a 'significant effect' on the price of a listed stock. That is information a reasonable investor would be likely to use as a basis for their investment. Inside information may only be disclosed where it is necessary to do so in the normal exercise of employment, a profession or duties.
35. Where it is necessary to disclose inside information, the FCA and SFO will keep a record of any decision to disclose and will notify one another, prior to the disclosure that the information is inside information this to enable one another to comply with their respective obligations thereunder.

36. In the case of joint or parallel investigations classified as inside information, the SFO and FCA will consult with one another around systems and controls for the disclosure and handling of inside information as well as maintaining insider lists, as appropriate, and making inside information public.
37. In the event of the information being made public in a form other than from a market announcement the FCA and SFO will consult each other immediately with a view to releasing the inside information to the market as soon as possible using an appropriate method. Such matters should be escalated immediately, internally within each organisation.

Information requests

38. In order to assist one another to respond to information requests as efficiently and effectively as possible, the FCA and SFO will:
- a. ensure formal requests for information and documents are made in writing;
 - b. ensure that requests are drafted with sufficient clarity, including a detailed description of the information required and the offences being investigated;
 - c. provide contextual information to help clarify the scope and terms of the request and, in particular, how the specific items requested will progress the matter in hand; and
 - d. consolidate similar requests.
39. Assistance available under this framework includes information and documents held in the FCA's and SFO's files in relation to entities and individuals of interest to one another, including but not limited to, intelligence reports, investigative files, and any evidential material which may assist the FCA or the SFO to advance their investigations and discharge their functions.
40. The FCA and the SFO may consult with one another over what is being sought by either agency where there is an apparent lack of certainty over the terms and scope of the request.
41. Where a SFO information request may capture items held by the FCA which attracts a higher level of classification than 'FCA Official' under the FCA's own protective marking scheme any such material will be retained by the FCA and may be made available for inspection and scheduling by the SFO on the FCA's premises.
42. The FCA and SFO will consult with one another in respect of setting realistic timescales for the delivery of any assistance requested and will raise and explain issues around potential delay as early as possible. Where either the FCA or the SFO is working to time limits set by external bodies, such as the court, they will inform one another with as much notice as possible of the relevant deadlines.

Unsolicited assistance

43. In addition to the above, the SFO and FCA will make all reasonable efforts to provide, without prior request, any information or intelligence considered likely to be of assistance to the other for the purposes of any criminal investigation or proceedings and/or the exercise of the FCA's statutory functions. Such disclosures will state the purpose for which the information is being provided.

Confidentiality and permissible uses

44. The FCA and SFO undertake to treat all non-public information exchanged between them as confidential, including the contents of requests for information, all consultations between the two agencies and any unsolicited disclosures.

45. The SFO and FCA will only use information and documents provided to them for the purpose contemplated at the time of disclosure or set out in the request unless otherwise agreed between them in writing and in accordance with any applicable law. Any disclosures will be made only as permitted or required under law.

46. The SFO and FCA will not otherwise use and/or disclose information to any third party, either in the UK or overseas.

47. Where a legal requirement exists on either the SFO or the FCA to disclose information received from the other, outside the scope of any submitted request, they will take steps to notify one another, prior to disclosure. To the extent the SFO or the FCA receives a legally enforceable demand for the information, they will notify the other prior to complying with the demand and will assert such legal exemptions or privileges with respect to such information as may be available.

48. The SFO and the FCA recognise their respective disclosure obligations in criminal matters continue throughout the life of an investigation and prosecution. The SFO and the FCA will, whenever possible and in a timely manner, keep one another informed of developments which concern material provided by, or relating to, the FCA or the SFO, throughout the process.

49. In the event that the SFO or FCA propose to make an application for Public Interest Immunity (PII) in respect of any material provided by the other, the SFO and FCA will provide the other with the opportunity to make representations regarding the public interest at the PII hearing whether through prosecution counsel or through separately instructed counsel by serving a notice under Rule 15.3 of the Criminal Procedure Rules 2020.

50. Additionally, the FCA is obliged to give disclosure at specific stages when regulatory or civil proceedings have begun, and on an on-going basis thereafter. The FCA will, whenever possible and in a timely manner, keep the SFO informed of developments which concern material provided by, or relating to, the SFO throughout the process.

Retention, restoration and disposal of all materials

51. The FCA and SFO will make decisions on the retention, restoration and disposal of all materials provided by one another in accordance with their respective Review, Retention and Disposal policy. Where any material is not restored to the FCA on conclusion of the SFO's investigation and related prosecutions, confiscation proceedings or appeals, the SFO will, where reasonably practicable, notify the FCA of the decisions taken in respect of such material but always where the material is to be destroyed or disposed of. The FCA undertakes to do likewise in respect of information received from the SFO.

Public communications

52. During the course of an investigation, the FCA and SFO will always consult with one another before making any public statements or issuing communications about any investigation where the other is providing assistance or might otherwise have an interest to allow the other to make representations and avoid any prejudice to one another's investigations. The FCA and SFO understand that it will be inappropriate for either the FCA or the SFO to comment on an investigation being undertaken by the other.

Freedom of Information and Subject Access Requests

53. If the FCA or the SFO receives a Subject Access Request under the Data Protection Act 2018 or a request for information under the Freedom of Information Act 2000 regarding information originating from or relating to the other, the requested organisation will inform the affected organisation about the request. The requested organisation will decide whether the information falls to be disclosed in accordance with the request or whether an exemption applies, taking into account the views of, and subject to receiving any necessary consents from, other relevant parties(s).

Miscellaneous items

54. The SFO will adopt the following security procedures for all SFO-related persons (including IT staff) with access to material provided to the SFO by the FCA:

- a. the minimum level of security clearance for staff and counsel is National Security Vetting Security Check (SC);

- b. Some staff may have a level of security clearance higher than SC where required;
- c. all staff and counsel will have completed a register of interests form;
- a. all staff and counsel will be signatories to the Official Secrets Act; and
- b. all staff and counsel will be aware of their duties and obligations not to discuss or disclose material outside those prescribed by legislation.

Communications with the Treasury Select Committee

55. As the UK's financial conduct regulator, the FCA is held to account by Parliament via the Treasury Select Committee and takes its responsibilities towards the Treasury Select Committee seriously. Mindful of the convention that precedence should be given to criminal investigations/proceedings wherever possible, where the FCA is of the view that it is appropriate that the Treasury Select Committee be informed of assistance the FCA is providing to the SFO, the FCA will discuss this with the SFO in advance as far as reasonably practicable.

56. Depending on the circumstances, it may be appropriate for certain safeguards to be put in place to address the interests of the SFO. For example, that the FCA informs only the Chair of the Treasury Select Committee on a confidential basis and that the SFO (and/or the Attorney General) write to the Chair to outline the SFO's interest in the matter.

SIGNATORIES

For and on behalf of the Serious Fraud Office

Sara Lawson KC, General Counsel

Sara Lawson KC

Date: 05.06.2023

For and on behalf of the Financial Conduct Authority

Therese Chambers, Executive Director of Enforcement and Market Oversight

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Date: 06.06.2023