

# **FCA Mission:** Our Approach to Enforcement

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# FCA Mission: Our Approach to Enforcement

## Contents

	Introduction	5
1	Our role in enforcement	8
2	How we identify harm	9
3	Diagnosing harm through our investigations	11
4	Sanctions and remedies available to us	13
5	Evaluating our approach to enforcement and measuring our performance	15
	Annex 1: Consultation question	16





# Introduction

Every day the UK population relies on a range of financial services, from basic bank accounts to car loans, mortgages, pensions and complex investment products.

Consumers need to have confidence in these services and the firms that provide them. They expect the market to be fair, open and competitive. They also have high expectations of those who regulate these firms.

Parliament created the FCA to regulate the conduct of the UK's financial services. The FCA is also the prudential regulator for all firms apart from banks, building societies, credit unions, insurers and large investment firms. These are authorised by the Prudential Regulation Authority (PRA) and regulated by both the PRA and the FCA.

Parliament gave the FCA a single strategic objective – to ensure that relevant markets function well – and three operational objectives to advance this:

- protect consumers – to secure an appropriate degree of protection for consumers
- enhance market integrity – to protect and enhance the integrity of the UK financial system
- promote competition – to promote effective competition in consumers' interests

The aim of our regulation is to serve the public interest by improving the way the UK financial system works and how firms conduct their business. By doing this, it benefits individuals, businesses, the economy and so the public as a whole.

We add public value by: enhancing trust in markets, improving how they operate, delivering benefits through a common approach to regulation, working to prevent harm from occurring and helping to put things right when they go wrong.

We need to use all of our powers and functions (including authorisation, supervision, competition and enforcement) to fulfil our objectives. Issues may span a sector or a number of firms, and we may wish to use a combination of powers and functions to address a problem. This may be through informal guidance, investigation, or early intervention as well as using powers and functions to take civil, criminal and/or disciplinary action.





We have started a review of our Penalties Policy and plan to publish a consultation paper later this year

## Making our approach to enforcement more transparent

This paper outlines our approach to enforcement and how that approach aligns with our Mission. It explains how we address harm and add public value through the use of our statutory powers to investigate and, where appropriate, take civil, criminal and/or disciplinary action where there has been a contravention<sup>1</sup>. We are seeking views on this paper, and details of how comments can be sent to us are set out at the end of this document.

More detailed information about our approach to enforcement, including our use of information gathering and investigation powers, our powers to obtain injunctions and restitution and our approach to our choice of sanctions, is set out in our Enforcement Guide (EG).<sup>2</sup> Information about how we make decisions and our penalty policy is set out in our Decision Procedure and Penalties Manual (DEPP)<sup>3</sup>. We also publish our Annual Enforcement Performance Account each year. This reports on the enforcement work we have carried out over the past year, with information about investigations opened, action we have taken and a statistical overview of our performance.

We have started a review of our Penalties Policy and plan to publish a consultation paper later this year. We are also starting work on a fuller review of the whole of our Enforcement Guide and aim to publish a consultation paper in 2019.

<sup>1</sup> In this document we use the word 'contravention' to include a breach of the Financial Services and Markets Act 2000 ('FSMA'), our Principles and rules set out in our Handbook, the commission of a criminal offence or failure to comply with any other applicable regulatory obligations, e.g. the Payment Services Regulations.

<sup>2</sup> [www.handbook.fca.org.uk/handbook/EG](http://www.handbook.fca.org.uk/handbook/EG)

<sup>3</sup> [www.handbook.fca.org.uk/handbook/DEPP](http://www.handbook.fca.org.uk/handbook/DEPP)



**We need to use all of our powers and functions (including authorisation, supervision, competition and enforcement) to fulfil our objectives**



# Chapter 1

## Our role in enforcement



**Market integrity and consumer confidence is stronger when misconduct is identified and dealt with quickly and fairly through legal processes**



Misconduct, if undetected or unaddressed, causes a loss of confidence and trust in the operation of our markets as well as financial loss to consumers and firms. Even though serious misconduct is relatively uncommon, failure to detect it or to take action magnifies the harm it may cause.

Market integrity and consumer confidence is stronger when misconduct is identified and dealt with quickly and fairly through legal processes. Improved detection increases public confidence in the regulatory process. It sends the message that misconduct will be uncovered and dealt with. It makes sure that those who may be tempted to commit misconduct have a keener sense that they are likely to be caught.

The overriding principle in our approach to enforcement is a commitment to achieve fair and just outcomes in response to misconduct. Wrongdoers must be held to account and our rules and requirements must be obeyed. Increasingly, severe penalties and sanctions alone are not enough to reduce and prevent serious misconduct. We must increase the likelihood of detection in tandem with efficient investigations.

Our approach to tackling serious misconduct is to:

- be responsive and efficient in detecting it
- investigate efficiently and fairly, including acting where there is serious misconduct and stopping investigations where it is clear there is no serious misconduct
- use deterrent and remedial powers, including financial penalties, prohibitions, suspensions as well as redress, or remedial and restorative measures wherever appropriate, to put things right
- encourage firms to voluntarily account for and redress misconduct (where it is reasonable for them to do so) by imposing lower sanctions on such firms
- impose more severe sanctions on those who fail to address harm
- communicate, through our formal statutory notices, the basis and the reasons for our actions, so they are transparent, fair, and firms and individuals can use that information to evaluate their own conduct





## Chapter 2

### How we identify harm

We aim to identify serious misconduct quickly so as to more easily reduce its consequences on consumers, markets and firms. The benefits of early detection are:

- preventing harm before it occurs
- the issues for investigation are likely to be more contained and ring-fenced, making the investigation quicker
- the speedy remediation of harm
- stronger market integrity and public confidence because firms and individuals are seen to be doing what is perceived to be right, in a timely way

Suspected misconduct may be detected through our Market Oversight, Supervision, Authorisation and Competition Divisions, as well as our financial crime, intelligence and whistleblowing teams.

We work closely and collaboratively with other regulators and law enforcement agencies both in the UK and overseas. For example, working with law enforcement agencies investigating crime can help us identify how criminal proceeds might be laundered through our financial markets. We also work closely with other international regulators, sharing information, intelligence and know-how as well as detecting and taking action to tackle cross-border misconduct.

#### Use of data

We make full use of all intelligence and data that we collect. This includes market data, information from firms (including self-reporting of breaches by firms), information from consumers, and information from public databases. We also value information from whistle blowers who may give us the earliest indications of wrong-doing.

#### Identifying a broad spectrum of misconduct

It is important that we are able to identify the full spectrum of serious misconduct spanning retail and wholesale markets, including:

- misconduct resulting from a lack of integrity
- serious failings in firm systems and controls, including governance and senior managers' failings
- mis-selling of unsuitable products to consumers
- anti-competitive behaviour
- financial crime, including insider dealing, market manipulation, false information in our markets and money laundering offences
- failure to make proper disclosure in primary markets
- unauthorised persons or firms carrying on regulated activity without appropriate authorisation from us, including investment scams



**We make full use of all intelligence and data that we collect. This includes market data, information from firms (including self-reporting of breaches by firms), information from consumers, and information from public databases**





All these types of misconduct cause harm to market integrity, confidence in the financial system and may cause loss to consumers. Focusing on detecting misconduct across the range of our regulatory responsibilities avoids gaps in our approach to enforcement and emphasises that all rules or requirements must be complied with.

### How we assess misconduct

Not all breaches of our rules or requirements constitute serious misconduct. Many breaches can be addressed and remedied elsewhere (and we expect them to be) without the need for enforcement action, especially where the breach is technical or minor.

Where we suspect serious misconduct, we will start an enforcement investigation. Suspected serious misconduct is not easy to identify, especially as we aim to detect it as early as possible. We use our experience and judgement to assess:

- the nature and severity of the actual and potential harm involved
- the extent to which the suspected misconduct has or may affect consumers, markets or firms if we do not take action
- whether the suspected misconduct has potentially wider or broader implications
- whether the suspected misconduct may have involved any lack of fitness or integrity
- whether evidence, including witnesses and documents, is likely to be available
- the public interest in investigating the matter

Where there is evidence firms may be in contravention or are not meeting our standards, we may use our powers under Part 4A of FSMA to vary permission, impose requirements or change individuals' approvals on our own initiative. These powers may be used to prevent or to stop harm from becoming serious. We can require firms to examine their conduct and address harm. In many cases, we will ask firms to voluntarily accept a variation of permission or the imposition of a requirement (VREQ). If firms refuse we may impose the variation or requirement under our own-initiative powers (OIREQ).

These powers may be used in cases involving less serious contraventions or failures to meet our standards. We will seek to use our VREQ or OIREQ powers where we suspect serious misconduct may have occurred and harm needs to be prevented immediately. In this situation, these powers are an important part of our approach to enforcement as well as our approach to supervision. See our 'Approach to Supervision' document for more information.

Investigations into historic events and circumstances are much harder to conduct. They often take longer because evidence may be lost and memories may be less reliable. We will still tackle such cases, especially where we suspect there has been delay by the suspected wrongdoer, or cover up tactics have prevented earlier detection.

Firms and individuals should not wait for an investigation to end before acting in a way they think is right. We encourage firms and individuals to examine their own affairs and, where appropriate, take their own remedial action. This includes putting right any harm or damage that may have been caused to consumers or agreeing to vary permissions or to the imposition of requirements under Part 4A of FSMA.

Firms that take action to address harm caused by serious misconduct demonstrate integrity. Honest action in response to wrongdoing, especially where consumers may have suffered losses, builds trust and confidence and helps our markets operate well. This does not mean we will not investigate the matter or take action where serious misconduct has occurred. We need to make sure there is full accountability for serious misconduct. However, we will acknowledge and give substantial credit to wrongdoers who speedily address wrongdoing when we decide on appropriate enforcement action.



## Chapter 3

# Diagnosing harm through our investigations



**We take a strategic approach in our investigations. We aim to quickly identify the heart of the case so we can focus on the key evidence and decide whether to continue with or close the investigation**



Opening an investigation does not mean we believe misconduct has occurred or that anyone involved in the investigation is guilty of misconduct. The purpose of the investigation is to get a full understanding of the facts so that we can make a decision about whether and, if so, what kind of action may be necessary.

We carry out investigations into both firms and individuals together where it appears those individuals may be involved in the suspected breach. Usually these investigations will be carried out at the same time. This allows relevant facts and matters to be considered together, in the round. This is especially important where relevant individuals have had a senior management or governance role in the circumstances under investigation.

We recognise that we must act fairly, and make sure that people suspected of wrongdoing are not under investigation for any longer than is necessary. Where it is clear there is no substance to suspicions or evidence of serious misconduct it is important that we end investigations promptly. In these cases, we may use other powers to address our concerns. See our 'Approach to Supervision' for more about how we use our other powers.

We take a strategic approach in our investigations. We aim to quickly identify the heart of the case so we can focus on the key evidence and decide whether to continue with or close the investigation. We also keep

the scope of our investigation under review, whether that is extending its scope or narrowing it and closing certain aspects of the investigation.

We do not pre-judge the outcome of an investigation. If we investigate a breach that might be the subject of criminal or civil proceedings, we will not decide straight away whether we are investigating to determine a criminal or civil breach. For example, in money-laundering and market abuse cases, an investigation might lead to either regulatory or criminal proceedings. Our approach is to make sure we fully understand what may have happened and make a decision based on the best admissible evidence available.

We may also open an investigation where we suspect anti-competitive behaviour under the Competition Act 1998.<sup>4</sup> Our power to investigate breaches of the Competition Act 1998 may be used at the same time as our powers to investigate under FSMA and may give rise to evidence of other breaches which may be the subject of enforcement action under FSMA.

### Our powers of investigation

We can compel individuals and firms:

- to attend before appointed investigators at a specified time and place and to answer questions
- to produce specific documents, or otherwise provide such information as the investigator may require

<sup>4</sup> Further information is also contained in our Approach to Competition document – [www.fca.org.uk/publication/corporate/our-approach-competition.pdf](http://www.fca.org.uk/publication/corporate/our-approach-competition.pdf)



We can also apply to a Magistrates' Court for a search warrant that allows us to enter premises in order to obtain evidence.

We use these vital powers frequently, to quickly find out what may have happened, without requiring firms and their employees to breach contractual or equitable duties of confidentiality. We will use our powers to do this where we believe firms and individuals have helpful information. This includes where we believe it may speed up the investigation at an early stage.

There are safeguards and limitations on the use of evidence obtained through the use of these powers. For example we cannot use evidence compelled from a person against them in criminal proceedings and we cannot compel any information that may be protected from disclosure by the existence of legal advice or litigation privilege.

We are obliged to act fairly and reasonably. Our investigations contain several important protections and guarantees:

- we send notice of the investigation, stating what the investigation is about and why it has been commenced (unless there is an initial concern that giving notice may prejudice the investigation)
- we give the person under investigation regular updates, including the next steps in the investigation
- a finding of misconduct cannot be made without due process (procedural fairness) which includes an opportunity for the firm or individual to review the investigation team's findings before any formal action is commenced or to resolve the case by agreement

## Deciding to take action

We will only make a decision about the outcome, including whether the case merits criminal, civil, regulatory action once there is sufficient evidence to justify such a decision at the end of an investigation. If there is, we will take into account the evidential merits of the case, whether there is a proper foundation for bringing the case and the public interest in deciding to start proceedings to obtain the appropriate remedy or sanction.

## Chapter 4

# Sanctions and remedies available to us



**We will not put a case to a firm or individual unless we have completed an investigation, we think there is sufficient evidence of serious misconduct and we are prepared to take action**



### Reaching the right outcome

We can take a number of routes to reach an appropriate outcome. The route taken will depend on whether we decide to take disciplinary action, or criminal or civil proceedings through the courts. Our approach in making decisions is set out in our Decision Procedure and Penalties Manual (DEPP).

We will not put our case to a firm or individual unless we have completed an investigation, we think there is sufficient evidence of serious misconduct and we are prepared to take action. If we decide to take disciplinary action, we will put our case to the firm or individual first to see if they wish to agree or contest the case.

If they do not agree with some or all of our case, they can make representations to the Regulatory Decisions Committee (RDC). The RDC is part of the FCA, but is separate from our executive management structure. Apart from the Chairman, none of the members of the RDC is employed by the FCA and none of them will have been involved in the enforcement investigation.

The case can also be referred directly to the Upper Tribunal (Tax and Chancery Chamber), or referred if the firm or individual disagrees with the RDC's decision. The Tribunal is entirely independent of the FCA and will consider the entire case afresh.

Any agreed resolution we reach with a firm or individual is a regulatory decision and represents an accurate and true picture of the wrongdoing that has been investigated.

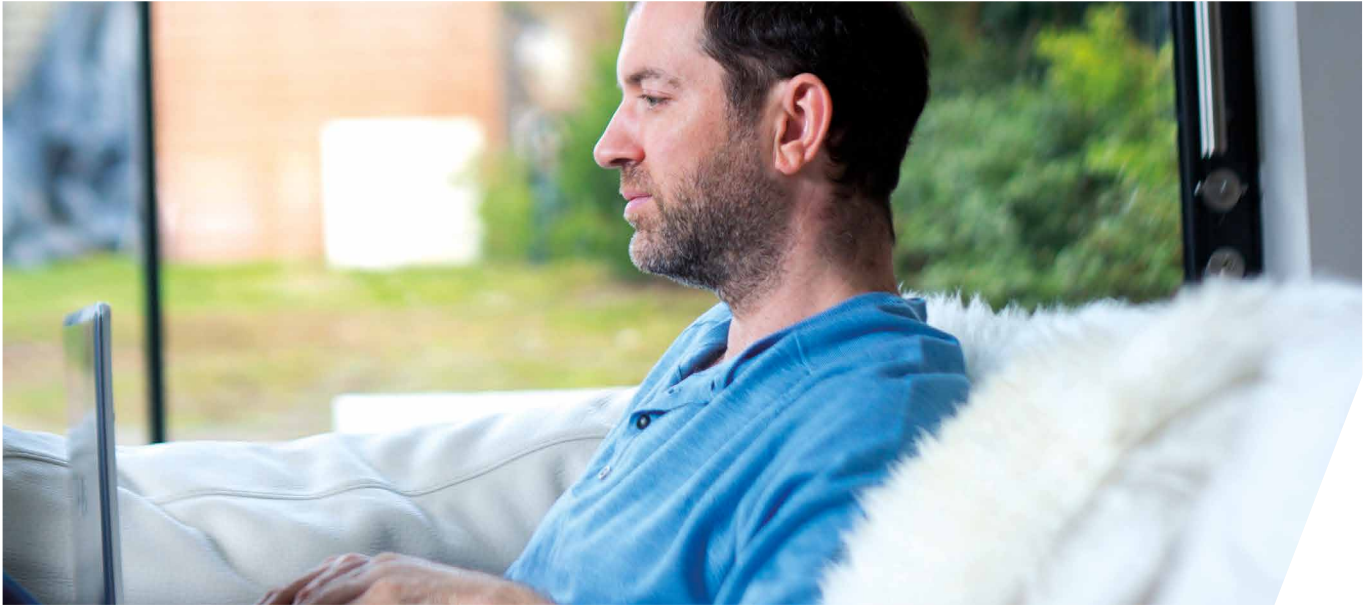
Firms or individuals can now get a ruling from the RDC on penalty and still obtain a full discount for cooperation where none of the facts or liability that flows from those facts is disputed.

We can prosecute firms and individuals who commit financial crime (for example, market manipulation or insider dealing). We can also prosecute firms and individuals who undertake regulated activities without authorisation. When deciding whether to prosecute, we apply the basic principles set out in the Code for Crown Prosecutors.

### Sanctions, remediation, redress and restitution

We aim to make sure the sanction is sufficient to deter the firm or individual from re-offending and deter others from offending. Where we take disciplinary action against a firm or an individual, we will consider all our sanctioning powers, including public censure, financial penalty, prohibition, suspension or restriction orders, as they may apply. We will also apply our penalties policy (DEPP).

When we assess the nature of the sanction, we take into account all relevant circumstances. This includes what steps the firm or individual has taken to address the harm and to cooperate with us, including, where relevant, in cooperating with any variation of permission or with the imposition of a requirement under Part 4A of FSMA. If firms and individuals



fully account for any harm caused, including putting it right where there are reasonable grounds to do so, we will consider this when applying sanctions. In extraordinary cases, it may determine whether a sanction is required at all.

If a firm or individual fails to take steps to address harm or refuses to cooperate fully with us, this will be taken into account and may justify heavier sanctions.

If appropriate steps have not been taken or more work is required to address the harm we will seek restitution orders or redress schemes. Redress is important for a number of reasons. Fines do not benefit the victims of wrongdoing, whereas redress directly compensates them. Redress can also deter misconduct by making the consequences of misconduct clear.

We will publish the results of our decisions in a Final Notice in accordance with sections 391 and 391A of FSMA. The Final Notice will make clear the basis for our findings, including the facts and our reasons for concluding there has been serious misconduct. This includes:

- whether the person(s) responsible has acknowledged responsibility
- if voluntary redress, remediation or restorative steps have been taken in a timely and effective manner
- the extent of cooperation with us
- the extent to which any of the above have reduced the sanction





## Chapter 5

# Evaluating our approach to enforcement and measuring our performance



**It is important to be open and transparent where action taken hasn't been as effective and successful as we would have liked and to focus on improving our use of our regulatory powers**



We carry out an annual assessment of whether:

- we are operating fairly and effectively in investigating suspected serious misconduct
- we are bringing regulatory proceedings, civil and criminal cases where appropriate

We publish this information every year in our Enforcement Annual Performance Account.

We take a number of factors into account in assessing whether we have acted effectively and added public value. These factors include whether we have:

- delivered outcomes which provide a clear and full account of what has happened
- delivered outcomes which deter the subject of the proceedings/others from misconduct
- made sure the subjects of an investigation feel they have been treated fairly and been given the opportunity to put forward their views
- where appropriate, secured effective redress and remediation action for consumers
- increased market confidence by improving market conduct
- outcomes which have delivered clear and consistent messages to the industry

We propose to measure the timeliness of our investigations and actions. It is important, from a public interest perspective, to be seen to identify and tackle misconduct quickly.

In the RDC's Annual Review of its performance and case load that is set out in the FCA's Annual Report, the RDC publishes a summary of its review and evaluation of our enforcement settlement process. Alongside this are its conclusions and any recommendations for further improvement.

It is important to be open and transparent where action taken hasn't been as effective and successful as we would have liked and to focus on improving our use of our regulatory powers.

Both during and at the end of any investigation, whatever the outcome, we will get feedback from subjects of investigations to continually improve our processes. Where investigations are closed without taking further action, we will still explain and feed back to firms and individuals what led to the suspicion of serious misconduct. We will use any lessons learned during the investigation to inform our supervisory and policy work.

By focusing on the above factors, we aim to create public value by improving how financial markets function and how firms and individuals conduct their business.



## Annex 1: Consultation question

### Q1.

**Has this paper set out our approach to enforcement clearly? If not, what more could we do to explain or clarify our approach?**

### How to respond

We are asking for responses to these questions and comments on the paper by 21 June 2018. You can send them to us using the form on our website at:

[www.fca.org.uk/approach-enforcement-form](http://www.fca.org.uk/approach-enforcement-form).

Or in writing to: Enforcement and Markets Oversight Division, Financial Conduct Authority, 25 The North Colonnade, Canary Wharf, London E14 5HS

**Email:**

[approachtoenforcement@fca.org.uk](mailto:approachtoenforcement@fca.org.uk)



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