



The Investigatory Interview

This month we look at interviews with the FCA and provide practical tips in the event that you are faced with a request or demand for an interview.

On what legal basis can the FCA summon you or your colleague for interview? How are these interviews carried out? If the investigating authorities show up at your firm and demand an immediate interview, what should you do? This article seeks to set out a guide to dealing with these questions.

On what basis can I be interviewed?

In the first instance, the FCA will consider which type of interview it wishes to use, whether voluntary or under its statutory powers:

FCA interviews	
Voluntary interviews	
	<p>Power: Rather than use the formal statutory powers available to the FCA (see below), the FCA will often invite a person holding relevant information to attend an interview on a purely voluntary basis.</p> <p>If a person declines a voluntary interview, the FCA may choose to exercise its statutory power under s171/172 FSMA to compel them to interview. Alternatively, if the person is a suspect, the FCA might request their arrest where there is a likelihood of the person running or destroying evidence.</p>
General statutory power	
S171/2 FSMA 2000	<p>Power: An FCA investigator may require a person who is the subject of the investigation or any person connected with the person under investigation to: (a) attend interviews or (b) otherwise to provide such information as the investigator may require.</p> <p>Where an investigator has been appointed under s168 FSMA to investigate a particular breach (namely those constituting criminal offences) this power extends to any person who is necessary or expedient to the investigation (i.e. holding relevant information) even if they are unconnected to the subject of the investigation.</p> <p>Limitation: The investigator must reasonably consider the questioning, provision of information, or production of a document to be relevant to the purposes of the investigation.</p>
Under caution	
Police and Criminal Evidence Act 1984 (PACE)	<p>Power: Individuals suspected of a criminal offence may be interviewed under caution using the following wording: <i>"You do not have to say anything. But it may harm your defence if you do not mention when questioned something which you later rely on in Court. Anything you do say may be given in evidence."</i></p> <p>Limitation: These interviews must be subject to the extensive safeguards of the relevant PACE Codes¹. Importantly, interviews under caution are attended voluntarily by the suspect.</p>
Under arrest	
Police and Criminal Evidence Act 1984 (PACE)	<p>Power: When the police have a power of arrest (namely because they have a warrant or reasonable grounds to suspect the person of committing a criminal offence), the FCA may request the police to make the arrest and bring the individual for questioning before the FCA. Note that the FCA does not have powers of arrest itself.</p> <p>Limitation: The power of arrest will only generally be used where either: (a) it appears likely that inviting the suspect to attend on a voluntary basis would prejudice an ongoing investigation or risk destruction of evidence or dissipation of assets; or (b) the suspect declines an invitation to attend a voluntary interview.</p>

¹ https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/252903/2013_Code_C.pdf

What notice will I receive?

If you are the subject of an FCA investigation, Section 170 of FSMA requires the FCA to provide you with notice of the appointment of investigators and the reason for the investigation. However, the FCA will not be required to provide you with any such notice if the FCA's view is that: (a) the provision of the notice would be likely to frustrate the investigation; or (b) you have committed certain offences, such as insider dealing under Part V of the Criminal Justice Act 1993.

If you are not the subject of the investigation, there is no formal notice requirement. However, where the FCA requires information from a particular person it will generally give an indication of the nature and subject matter of the investigation.

Does the fact I'm being interviewed mean I am a suspect?

If you are in receipt of a Section 170 notice, as referred to above, you are the "subject of investigation" and therefore may be, in the FCA's view, a suspect. If you have not received any such notice, but you are asked by the FCA to attend interview, it may be too early for the FCA to decide whether you are a suspect. As you will see below, our recommendation is that you ask at the start of the interview for clarification of its basis and of your position with regard to the investigation, in particular whether you yourself are suspected of any wrongdoing.

On the other hand, if you are being interviewed under caution under PACE, or you are under arrest, this is almost certainly because you are suspected by the FCA of having a committed criminal offence.

Am I entitled to have a lawyer present?

In respect of non-PACE interviews, the FCA's policy is to allow you to have a lawyer present in virtually all circumstances.

In respect of interviews under PACE, it is your legal right to have a lawyer present.

Can I just refuse to attend and/or refuse to answer questions at a compulsory interview?

There can be severe consequences for your failure to attend an interview or refusal to answer questions:

Voluntary interviews

As the name suggests, you are not obliged to attend a voluntary interview or to answer questions put to you at that time. However, the FCA's view is that, in an appropriate case, an adverse inference may be drawn from your failure to attend a voluntary interview, or a refusal to answer any questions at such an interview.

FCA interviews under s 171/2 FSMA 2000

- This interview is compulsory and as such you have no right to refuse to respond to a question or to remain silent. However see 6 and 7 below in relation to the protection

against self-incrimination which the FCA is required to explain at the start of the interview.

- Failure to attend the interview at all could result in proceedings for contempt of court following an application to court by the FCA, resulting in a fine, imprisonment or both.
- Provision of false, misleading or reckless information during the interview could amount to a criminal offence under s177 FSMA, with a penalty of up to 2 years imprisonment and a fine.

PACE 1984 interviews:

- As the caution states, an interview under PACE 1984 entails a right to silence for the suspect.
- However, by virtue of the Criminal Justice and Public Order Act 1994, adverse inferences can in certain circumstances be drawn from silence or from a failure to attend a voluntary interview.

What can the FCA do with my answers?

Any statement you make to the FCA is admissible in evidence in any proceedings, so long as it also complies with any requirements governing the admissibility of evidence in the circumstances in question.

However, if the FCA brings criminal proceedings against you, it will not generally be able to rely on information it obtained from you in interviews under compulsion under s171 or 172 of FSMA (as opposed to voluntarily under PACE).

Practical Tips

Here are a few useful points to bear in mind if the FCA requests or demands an interview:

Get time

Always ask, where possible, whether it would be possible to hold the interview at a later time. For example, the next day. Try to avoid being "bounced" into the interview unless you are being held under arrest, in which case you will be required to attend.

Get information

Ask the investigating authority for:

- A copy of all and any notices, warrants and appointments relevant to your interview.
- Explanation of the statutory powers under which they are requesting you attend for interview.
- Confirmation of whether you are being interviewed as a potential witness or a suspect.
- Information on the broad topics of the interview and what questions might be asked.
- Any documents they have which they wish to ask questions about so you can see them in advance. The FSA (FCA's predecessor) used to be willing on occasion to provide documents in advance but this now happens much more rarely than it used to.

- What materials it would be helpful to bring in order to assist in refreshing your memory.
- How long the interview is likely to take.
- Who will be attending the interview.

Get advice

- We strongly recommend that you have a lawyer present at any FCA interview, regardless of its basis.
- Careful consideration needs to be given on a case-by-case basis as to the appropriateness and advantages and disadvantages of attendance of in-house or external legal advisors and whether separate representation is required for employee and employer.

Get compulsory (avoid confidentiality breaches)

- Disclosure of confidential information in a voluntary interview will leave an interviewee at risk of breaching confidentiality obligations.
- By contrast, the issue of a notice overrides any obligations of confidentiality or secrecy attaching to information, except for information which attracts legal professional privilege.
- If you are being asked to disclose such confidential information, consider requesting that the conduct of the interview be under compulsion.

- Importantly, statutory protection against self-incrimination is provided in compulsory interviews. The FCA will make a standard statement to this effect at the start of the interview. If an interview proceeds on a voluntary basis, this protection is not available.

Get your statement right

- Do not sign a statement produced by the FCA without you and your legal advisor carefully scrutinising its accuracy and completeness.
- Explain that you will need further time to finalise your statement.
- Request a copy of the tape recording of the interview, which you are entitled to, in order to assist you in finalising your statement.

Get on their side

- Remember that cooperation with the investigatory authorities, as well as being required by Principle 11 of the Principles for Businesses, is likely to be taken into account by them as a mitigating factor for any breach or offence committed.

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