

The Protection of Regulatory Information under English Law

Introduction

1. The purpose of this memorandum is to summarise how English law protects information obtained by the Financial Services Authority (“FSA”) under the Financial Services and Markets Act 2000 (“FSMA”). Such information is referred to here as “regulatory information”.
2. As an integrated regulator, the FSA has a number of functions. The main functions are banking regulation, the regulation of investment and insurance businesses, of financial markets and exchanges in the UK and being the listing authority for the UK.
3. Under FSMA the same confidentiality restrictions generally apply to information obtained where we are carrying out these various regulatory functions. What does affect the precise restrictions which apply is whether or not the information is covered by the confidentiality provisions of the EU single market directives. The restrictions which apply to such information are more restrictive than those which apply to other regulatory information. This memorandum assumes that the EU restrictions apply, which will typically be the case for information disclosed by the FSA to an overseas regulator of banking, investment or insurance businesses.

Overview

4. The main provisions governing the treatment of regulatory information obtained by the FSA are set out in sections 348 and 349 of FSMA and the regulations (“Regulations”) made by HM Treasury under section 349. Copies of sections 348, 349 and the Regulations¹ are attached.
5. The provisions broadly make any unauthorised disclosure of regulatory information a criminal offence (section 352 FSMA). The provisions also set out the circumstances in which the basic restriction on disclosure either does not apply, or is relaxed to permit disclosure for certain purposes or to certain persons.
6. Other rules of law also touch on the confidentiality of regulatory information, and reference to these will be made towards the end of this memorandum. We send overseas regulators a consolidated version (available commercially) of the Financial Services and Markets Act 2000 (Disclosure of Confidential Information) Regulations 2001 and all amendments thereto. Copies of the Regulations can be obtained individually from Her Majesty’s Stationery Office (<http://www.legislation.hmso.gov.uk/legislation/uk.htm>).

FSMA.

7. Except as provided for by FSMA or the Regulations, the FSA must not disclose information relating to the business or other affairs of any person, which it has obtained for the purposes of, or in the discharge of, any functions under FSMA. Where other individuals or organisations receive restricted information from the FSA, directly or indirectly, the information remains subject to the restrictions on further disclosure by them.
8. There are a number of circumstances in which regulatory information may lawfully be disclosed. These are as follows:
 - a) Where the person from whom the information was obtained, and (if different) the person to whom it relates, consents;
 - b) Where the information is already available to the public from other sources;
 - c) Where the information is in the form of a summary or collection of information so framed that it is not possible to ascertain from it information relating to any particular person; or
 - d) Where one of the exceptions (described as ‘gateways’) set out in FSMA or the Regulations (as described in paragraph 9 below) applies.
9. FSMA/the Regulations set out the gateways where the FSA is permitted to disclose regulatory information for certain purposes and/or to certain persons. The following is a list of the more important ones.

- To enable or assist the FSA to carry out its regulatory work (the “self-help” gateway). This gateway could, for example, be used to allow the FSA to check information received from a regulated firm with another authority;
- To HM Treasury (the UK Government Department with responsibility for legislation in the financial services sector) to enable or assist it to discharge its public functions, in cases where this is necessary for reasons of prudential control;
- To enable or assist certain other bodies, listed in Schedule 1 at the end of the Regulations, to discharge specified functions. For example, to the Bank of England (the UK’s central bank) to assist it in discharging its functions as a monetary authority or in relation to overseeing payment systems. And to recognised investment exchanges, UK competition authorities, EEA investor/depositor compensation bodies; and other listed UK supervisors/regulators of financial bodies in order to assist them discharge certain specified functions.
- For the purposes of any criminal proceedings or investigations in the UK or elsewhere.
- For the purpose of certain other civil and regulatory proceedings under FSMA, and e.g. for the purposes of proceedings under the Company Directors Disqualification Act 1986 in respect to a director or former director of an UK authorised person or for disciplinary proceedings against auditors or actuaries.
- To assist overseas regulatory authorities (including investment exchanges) carry out their functions as such (subject to there being a cooperation agreement in place and an “equivalent” condition being met that the information when received by the overseas regulator is subject to guarantees of professional secrecy at least equivalent to those set out in the FSMA, the Regulations and the EU single market directives).

Data Protection legislation

10. The FSA is also bound by the UK’s Data Protection Act which implements the EU Data Protection Directive. This protects personal data (i.e. data about living individuals) and places restrictions on the FSA’s ability to disclose personal data within the UK and overseas. The FSA’s ability to disclose personal data outside the EEA is very limited.

The FSA is only able to disclose such information in cases where it is necessary to do so in order to perform an important public interest function. Or where the Information Commissioner is satisfied that the data protection legislation in the receiving jurisdiction contains equivalent protection and confers equivalent rights on individuals to those under the Data Protection Act. The Data Protection Act also provides individuals with a right of access to data (including regulatory information) relating to them, other than in certain cases e.g. where disclosure would prejudice the FSA’s regulatory functions or a criminal investigation.

Freedom of Information Legislation

11. From January 2005 the FSA (in common with other public bodies in the UK) has been making available to the public information relating to its regulatory functions. This is subject to two important exemptions. First, personal data is excluded; it continues to be subject to the Data Protection Act regime (see previous paragraph). Secondly, information subject to statutory restrictions on disclosure is excluded. This includes regulatory information, as defined in Paragraph 1 above, which is not publicly available. Requirements to disclose information, as defined in Paragraph 1 above, which is not publicly available.

Requirement to disclose information

12. FSMA and the Regulations do not impose an obligation on the FSA to disclose particular information to other bodies (except when regulatory action or litigation is being taken under or for the purposes of FSMA). The FSA is however under a statutory duty to co-operate (including the sharing of information) with overseas regulators and with other persons in relation to the prevention and detection of financial crime (see also paragraph 15 below).

Other legislation

13. The FSA also receives regulatory information from other UK public bodies. In such a case the information may be subject both to the restrictions on disclosure in FSMA and the confidentiality provisions of the legislation governing that body. Examples of such legislation are the Bank of England Act 1998 and the Companies Act 2006. Before the FSA can make further disclosure of this kind of information, the position under that legislation and under FSMA has to be considered.

Parliament

14. The UK Parliament, being paramount in constitutional terms, could in the last resort override any statutory or other confidentiality obligations applying to the FSA, if it wanted to obtain regulatory information from the FSA or any other person in possession of it. In order to do this, a full vote in the House of Commons would likely be required. The FSA considers it highly unlikely that Parliament would force the FSA publicly to disclose information in this way.

Subpoenas in criminal and civil litigation

15. Subject to any valid legal objections, the FSA is, like any other UK public body, obliged to comply with a court witness summons, requiring it to provide oral evidence or documents in civil or criminal litigation to which it is not a party. (Where the FSA is subject to legal proceedings arising out of its functions under FSMA it will be subject to the disclosure obligations on litigants generally.) However, the FSA can only be compelled to provide evidence by way of witness summons in circumstances where it would be permitted to disclose that information in accordance with FSMA. This means that, subject to making a claim for public interest immunity (see paragraphs 16 and 17 below), or relying on any other statutory restrictions (see paragraph 13 above), the FSA can be compelled to provide regulatory information in criminal litigation, but not in civil litigation which is not connected with FSMA (e.g. a claim of negligence or misrepresentation made by a customer against a regulated firm). But a claim by such a customer that a breach of FSA rules caused him loss would allow regulatory information to be disclosed by the FSA.

Public interest immunity

16. In English law, where a Department of State or other public body considers that disclosure of particular information in the course of civil or criminal litigation would be seriously harmful to the public interest, the Department or public body may ask the Court dealing with the litigation not to order disclosure, by making a claim of public interest immunity ("PII"). A PII claim would be appropriate, in the context of the FSA's functions, e.g. where disclosure of the information could prejudice its ability to perform those functions or jeopardise its ability to receive information in the future from certain sources, including overseas regulators.

17. A PII claim does not, however, provide absolute protection against disclosure. It is for the Court to decide whether the interests of justice to the party seeking disclosure override the public interest arguments raised by the public body seeking protection from disclosure. However, the FSA anticipates that the Court would give due weight to the importance of protecting information received from overseas regulators.

A duty of confidence

18. Where information is provided to a recipient on condition that he will not disclose the information without the consent of its provider, the English Courts will impose a duty of confidence on the recipient. Where the recipient intends to disclose the information voluntarily, without the consent of the provider, the Court may prevent such disclosure by way of injunction (unless the information has already become public). This remedy is of some value where regulatory information provided by an overseas regulator is concerned. While the duty of confidence can be overridden by a witness summons in criminal or civil litigation and by Parliament, the Courts will give due weight to the source of the information when deciding whether to compel its production. The duty may also be of value in supporting a claim of public interest immunity (paragraphs 16 and 17 above).

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Extract from FSMA

Section 348

- (1) Confidential information must not be disclosed by a primary recipient, or by any person obtaining the information directly or indirectly from a primary recipient, without the consent of –
- (a) the person from whom the primary recipient obtained the information; and
 - (b) if different, the person to whom it relates.
- (2) In this Part “confidential information” means information which –
- (a) relates to the business or other affairs of any person;
 - (b) was received by the primary recipient for the purposes of, or in the discharge of, any functions of the Authority, the competent authority for the purposes of Part VI or the Secretary of State under any provision made by or under this Act; and
 - (c) is not prevented from being confidential information by subsection (4).
- (3) It is immaterial for the purposes of subsection (2) whether or not the information was received –
- (a) by virtue of a requirement to provide it imposed by or under this Act;
 - (b) for other purposes as well as purposes mentioned in that subsection.
- (4) Information is not confidential information if-
- (a) it has been made available to the public by virtue of being disclosed in any circumstances in which, or for any purposes for which, disclosure is not precluded by this section; or
 - (b) it is in the form of a summary or collection of information so framed that it is not possible to ascertain from it information relating to any particular person.
- (5) Each of the following is a primary recipient for the purposes of this Part –
- (a) the Authority;
 - (b) any person exercising functions conferred by Part VI on the competent authority;
 - (c) the Secretary of State;
 - (d) a person appointed to make a report under section 166;
 - (e) any person who is or has been employed by a person mentioned in paragraphs (a) to (c);
 - (f) any auditor or expert instructed by a person mentioned in those paragraphs.
- (6) In subsection (5)(f) “expert” includes –
- (a) a competent person appointed by the competent authority under section 97;
 - (b) a competent person appointed by the Authority or the Secretary of State to conduct an investigation under Part XI;
 - (c) any body or person appointed under paragraph 6 of Schedule 1 to perform a function on behalf of the Authority.

Section 349

- (1) Section 348 does not prevent a disclosure of confidential information which is-
- (a) made for the purpose of facilitating the carrying out of a public function; and

- (b) permitted by regulations made by the Treasury under this section.
- (2) The regulations may, in particular, make provision permitting the disclosure of confidential information or of confidential information of a prescribed kind –
- (a) by prescribed recipients, or recipients of a prescribed description, to any person for the purpose of enabling or assisting the recipient to discharge prescribed public functions;
 - (b) by prescribed recipients, or recipients of a prescribed description, to prescribed persons, or persons of prescribed descriptions, for the purpose of enabling or assisting those persons to discharge prescribed public functions;
 - (c) by the Authority to the Treasury or the Secretary of State for any purpose;
 - (d) by any recipient if the disclosure is with a view to or in connection with prescribed proceedings.
- (3) The regulations may also include provision-
- (a) making any permission to disclose confidential information subject to conditions (which may relate to the obtaining of consents or any other matter);
 - (b) restricting the uses to which confidential information disclosed under the regulations may be put.
- [(3A) Section 348 does not apply to—
- (a) the disclosure by a recipient to which subsection (3B) applies of confidential information disclosed to it by the Authority in reliance on subsection (1);
 - (b) the disclosure of such information by a person obtaining it directly or indirectly from a recipient to which subsection (3B) applies.]
- (4) In relation to confidential information, each of the following is a “recipient” –
- (a) a primary recipient;
 - (b) a person obtaining the information directly or indirectly from a primary recipient.
- (5) “Public functions” includes –
- (a) functions conferred by or in accordance with any provision contained in any enactment or subordinate legislation;
 - (b) functions conferred by or in accordance with any provision contained in the Community Treaties or any Community instrument;
 - (c) similar functions conferred on persons by or under provisions having effect as part of the law of a country or territory outside the United Kingdom;
 - (d) functions exercisable in relation to prescribed disciplinary proceedings.
- (6) “Enactment” includes –
- (a) an Act of the Scottish Parliament;
 - (b) Northern Ireland legislation.
- (7) “Subordinate legislation” has the meaning given in the Interpretation Act 1978 and also includes an instrument made under an Act of the Scottish Parliament or under Northern Ireland legislation.

Section 352

- (1) A person who discloses information in contravention of section 348 or 350(5) is guilty of an offence.
- (2) A person guilty of an offence under subsection (1) is liable –
 - (a) on summary conviction, to imprisonment for a term not exceeding three months or a fine not exceeding the statutory maximum, or both;

(b) on conviction on indictment, to imprisonment for a term not exceeding two years or a fine, or both.

(3) A person is guilty of an offence if, in contravention of any provision of regulations made under section 349, he uses information which has been disclosed to him in accordance with the regulations.

(4) A person is guilty of an offence if, in contravention of subsection (4) of section 350, he uses information which has been disclosed to him in accordance with that section.

(5) A person guilty of an offence under subsection (3) or (4) is liable on summary conviction to imprisonment for a term not exceeding three months or a fine not exceeding level 5 on the standard scale, or both.

(6) In proceedings for an offence under this section it is a defence for the accused to prove –

(a) that he did not know and had no reason to suspect that the information was confidential information or that it had been disclosed in accordance with section 350;

(b) that he took all reasonable precautions and exercised all due diligence to avoid committing the offence.