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Private and Confidential
Sent by email only
Ms Amerdeep Somal
Complaints Commissioner

31 May 2022

Dear Amerdeep

Transparency MOU and Protocol updates

Thank you for sharing the draft of your proposed MOU on Transparency and Confidentiality for consideration and for our ongoing discussions on updating the Protocol.

Firstly, as outlined in our meeting earlier this month, please accept my sincere apologies for the delay in formally responding to you on these matters. We have been discussing them in detail at working level, including with the Bank of England (Bank) / Prudential Regulation Authority (PRA), and I was keen that we had a firmer view on how these were progressing before responding. As explained, this work has also been delayed due to changes in personnel within the Complaints Team occurring somewhat prior to that anticipated – please also accept our apologies for not explaining this to you. The proposed updated Protocol is attached for your consideration (Annex 1). We have also now had the opportunity to properly consider the draft MOU (Annex 2), and the broader comments made in your letter of 9 August 2021 in light of these ongoing discussions.

In general terms, and as we have discussed previously, I fully support the principle of ensuring transparency of decision-making in our complaints handling. We continue to consider changes we could make to our current practices and ways of working that would be beneficial in the interests of promoting accountability and also better identification of opportunities for learning, in line with our transformation aims of continuous improvement.

Having considered the points you raised in your letter of 9 August, I am not yet persuaded there is currently sufficient justification for the FCA to develop and maintain a separate MOU to run alongside (and in addition to) the existing legislative provisions, the Complaints Scheme, and the Protocol agreements. I can easily envisage there being significant disadvantages to having multiple documents created in parallel, and separately with each Regulator, increasing the risk of confusion or inconsistencies in the application of the legislative or Scheme provisions. It would also increase the training burden on our staff to understand which document they need to refer to in any given situation, including which has primacy,

particularly if dealing with a complaint relating to the action of more than one Regulator. If your main concern is around being able to make the content of our agreement public, we would be happy for any agreement reached - such as in the Protocol document - to be published as an extract of the Protocol document, for example the section on confidentiality.

The FCA has typically adopted an open approach to sharing confidential information with the Complaints Commissioner, taking the view that, in the interests of transparency, it is appropriate and necessary for the Commissioner to be able to see all the information that has been gathered by the Complaints Department during the course of an investigation wherever possible. For this we rely on the legal gateway under Regulation 3 and/or Regulation 9 of the Disclosure Regulations to justify full disclosure on the basis that it is necessary for the purpose of discharging our public functions and/or that it is necessary for the discharge of the Commissioner's functions as the investigator appointed under s.84 of the Financial Services Act 2012. This approach has been feasible to maintain due to us having a broadly shared understanding of the relevant legal and policy restrictions, and because the information we share with the Commissioner remains restricted information. We have always had a high level of trust that, in general, the confidentiality of the information we share would be respected. Noting the ability of the FCA to impose conditions or restrictions on the onward sharing of s.348 information (under Regulation 7), and bearing in mind there could be a difference of opinion that arises regarding the justification for disclosure, there is obviously already a process (documented in the Protocol 7.2) for expressly seeking our views on disclosure in such instances.

Aside from the practical challenges posed by having multiple separate reference documents (e.g. legislation, the Scheme, the Protocol, an MOU etc), there are also some legal issues with the proposed MOU content meaning that we would not be in a position to agree it as currently drafted. At a high level, I outline these issues below, and suggest perhaps these could be explored in more detail, either separately or as we finalise the Protocol during the next couple of weeks.

Specific challenges / legal issues

- The proposed definitions of "embedded" and "discretionary" information in paragraphs 5 and 6, as these do not accord with our current practice or the legislative provisions. Although we do of course recognise "embedded" s.348 confidential information as a legal concept, we think that there is a risk of confusion in creating new definitions not used in statute, by the ICO or the Tribunal, a position we also hold in relation to the use of a concept of "discretionary" information. This is an area we think would benefit from further discussion, including with our legal colleagues. Understanding (and documenting) the types of circumstances when the Commissioner is likely to consider it "necessary" to disclose confidential information (whether under the s.348 definition or for other reasons) to an individual complainant (as referenced in paragraphs 9-12 and 20-21 for example). Under public administrative law, we both have a duty to act fairly, rationally and lawfully and not interfere with the human rights of a firm or an individual unless it is proportionate to do so. It would, therefore, be helpful to better understand the types of circumstance where you consider it is likely to be considered necessary to disclose such information to an individual complainant.

- Where s.348 confidential information is disclosed to an individual complainant, they must also be made aware of the statutory restrictions that apply as they would be prohibited from onward disclosure of that information, given that it would remain s.348 information in their hands, and they are unlikely to be able to rely on a legal gateway permitting disclosure. This is important because, where any individual breaches the prohibition on disclosure set out in s.348, it would be a matter for the FCA to take action as the prosecuting authority for this offence.
- Whilst the Commissioner can make a decision that it is necessary to disclose confidential information and do so relying on Regulation 10 of the Disclosure Regulations (subject to the FCA not having imposed any conditions under Regulation 7), the Commissioner is not the arbiter of what is or is not FCA confidential information (under s.348 or otherwise) as appears to be suggested in paragraph 16. There is a statutory definition of s.348 confidential information, which cannot be overridden by any agreement in the proposed MOU.

I do want to stress what I stated above – we are fully supportive of the principle of ensuring transparency of decision-making in our complaints handling. While our view is that the MOU is not the best vehicle to achieve that transparency, we recognise there are improvements we need to make. In essence, I think we both seek to achieve the same objective - to be as transparent as we can whilst successfully navigating the legal and policy frameworks in place. We would, therefore, welcome a discussion with you to establish how our shared goal is best achieved.

Protocol update

In terms of the Protocol, we have, in collaboration with the Bank/PRA, been able to develop versions of our respective Protocol documents that mirror each other entirely, save for a few additional paragraphs needed in the FCA version around transcribing of calls and provision of MI. As outlined above, this latest version is attached for your consideration.

I am pleased to be able to advise that we are now rolling out the new Investigation Report template previously discussed. I would highlight though that, since our working level discussions, we have decided it will only be used for our complex investigated complaints and we will use an abridged version for the remaining complaints, to maximise our efficiency and effectiveness, bearing in mind the need for us to demonstrate Value For Money in everything we do. Both reports will include specific prompts for the Complaints Investigator to flag up information that is confidential or restricted for reasons other than s.348 FSMA, so that you will be aware of any potential confidentiality considerations.

Whilst the revised Protocol is attached for your consideration, there remain two areas where there is potentially a gap between the FCA's/Bank's proposed drafting and the OCC's proposals. These two areas are interviewing of FCA staff and the management of high-volume/group complaints.

In terms of the section about interviewing staff, whilst this wording is used in the current Protocol document, I understand that there has not to date been any instance when the Commissioner has requested to formally interview a member of FCA staff. Accordingly, we have adopted the wording proposed in the Bank version of the Protocol, of staff being invited

for "a meeting" with the Commissioner, which we consider more appropriately represents the approach that has been adopted to date.

I understand there may have been a suggestion that, not only should the formal reference to "interviewing" be specifically retained, but that perhaps it also needed to be enhanced because FCA staff might need to obtain independent legal representation (potentially at their own expense) before being formally interviewed by the Commissioner, with transcripts of their interviews not being shared with the FCA. In our view, such an approach would not be appropriate and is not in accordance with the general expectations of the Complaints Scheme, it not being either an adversarial or formal legal process.

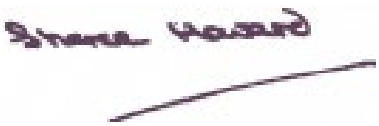
In relation to the second point, namely the management of high-volume/group complaints, we agree it would be helpful and appropriate for us to provide broad information about 'group' complaints, including, for example, volumes, dates of updates, and when we expect to issue decision letters, given the potential impact of related referrals for you and the operation of your office. However, we consider it appropriate to maintain a very clear boundary between the Stage 1 management of the complaints, and the Stage 2 process (review by the Commissioner after our Stage 1 decisions). In our view, the sharing of draft reports or updates for review could lead to issues at Stage 2, including creating the possibility for allegations or perception that the Commissioner had expressly or impliedly approved (or even contributed to) decisions the Regulator had made during Stage 1.

We also consider that having a section in the Protocol headed "high volume/group complaints" could potentially lead to some misunderstanding or confusion, because every complaint made under the Scheme must be considered and assessed individually with respect to scope and eligibility, irrespective of whether there may be common elements of investigation that causes us to combine aspects of their management at the investigation stage for efficiency and effectiveness reasons.

I would also draw to your attention the deletion of paragraph 7.3 (inserted by us in January 2022) relating to the identification of any confidential information (for reasons other than being protected under s.348). Given the discussions that still need to take place regarding confidentiality and transparency, it makes sense to consider any changes as part of those discussions.

Once you have had an opportunity to consider the latest draft of the Protocol attached, please let me know if there are any areas where you consider a further meeting with myself/the FCA or a tri-partite meeting with the Bank may be helpful to try and reach a concluded position promptly on any remaining points.

Yours sincerely



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