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FCA Powers Used at the Request of Overseas Regulators: A practical summary

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It was recently reported that the UK's Financial Conduct Authority (FCA) has experienced a notable increase in the number of requests for assistance from foreign enforcement agencies over the course of the last five years.[1] Given London's place as a global financial centre, and the levels of enforcement activity that have existed across the globe since the financial crisis, it is perhaps unsurprising that cooperation amongst regulators is on the rise. In addition to increasing the compliance burden on businesses, the effect of this has been to highlight particular areas of risk for those who find themselves the subject of FCA processes on behalf of foreign regulators.

The FCA has a broad discretion to assist its foreign counterparts and exercises that discretion liberally.[2] The scope for challenging the FCA's decision to assist is therefore limited. However, the legal and policy framework does present some avenues through which individuals and companies, who find themselves subject to requests on behalf of overseas regulators, can better manage the process and protect themselves. This article aims to be a short guide on this area of regulatory practice. It will consider the topic in four parts:

i. The scope of the FCA's discretion to exercise its powers on behalf of an overseas regulator;
ii. The powers available to the FCA when assisting an overseas regulator;
iii. The conduct of interviews; and
iv. The restrictions on the use and onward transfer of any information provided in discharge of that assistance.

The FCA's authority for conducting investigations in support of an overseas regulator is enshrined in section 169 of the Financial Services and Markets Act 2000 ("the Act"), as supplemented by the relevant FCA policy which can be found in the Decision Procedure and Penalties Manual ("DEPP"). Both the Act and DEPP are referenced extensively throughout this article.

Scope of the FCA's discretion to assist

The FCA has a statutory discretion, under section 169 of the Act, to exercise its powers at the request of an overseas regulator. This discretion is broad and relatively unfettered. The FCA is **not** under any duty either to investigate or verify the information provided by the overseas regulator, or to

second-guess the overseas regulator's application of its own domestic law, and is therefore not required to examine the request critically.[3] However, in considering the exercise of its discretion it *may* take into account:

- whether corresponding assistance would be given by the foreign state to the UK regulatory authority;
- whether the matter concerns a breach of a law or requirement which has no "close parallel" in the UK, or involves the assertion of a jurisdiction not recognised in the UK;
- the seriousness of the case and importance to the UK; and
- whether it is otherwise appropriate in the public interest to provide the assistance sought.

In addition to the FCA's statutory power to assist, there are a number of Memoranda of Understanding (MoU) in existence between UK and overseas regulators (most notably the SEC and other US regulators) concerning cooperation and information-sharing in relation to both their enforcement and supervisory functions. However, any ostensible incompatibility between the provisions of a relevant MoU and the terms of a request is unlikely to be a basis for any formal challenge. The Court of Appeal confirmed in *Financial Services Authority v Amro* [2010] EWCA Civ 123 that the only requirements the FCA was subject to, when considering a request from an overseas regulator, were those enshrined in statute.[4]

Powers available to the FCA

The powers available to the FCA in assisting an overseas regulator are both supervisory and investigatory. It can use its power under section 165 of the Act to require an 'authorised person' (i.e., a regulated entity), or a person "connected" with an authorised person (for example an employee), to produce either specific information/documents or those which fit a specified description.[5] In considering whether the description of documents is sufficiently clear, the stringent rules concerning the drafting of a *subpoena* do not apply. The description will be acceptable provided the recipient can identify the documents he is required to produce.[6]

Alternatively the FCA can appoint investigators, and in so doing have access to the powers set out at section 171 and 172 of the Act. Through these provisions the FCA can require **any** person to attend an interview, provide information and produce specified documents or documents of a specified description. If the recipient of the FCA's requirement letter is the subject of the investigation, or is connected with the subject of the investigation, the information sought need only be "relevant for the purposes of the investigation".[7] However, the FCA's use of these powers is more restricted where the person in question is not "connected" with the person under investigation. In such circumstances the FCA must be satisfied that the information sought is "necessary or expedient for the purposes of the investigation".[8]

Whilst any person compelled to provide documentation or information ultimately has little alternative but to comply, the FCA are generally receptive to reasonable arguments based on practical impediments to compliance. If there are justifiable grounds for suggesting that a requirement is disproportionate—for example because the timeframe for compliance is too short or the collection of documents would have significant cost implications for the individual—these issues can often be

resolved through early and informal engagement with the FCA.

Conduct of interviews

Subject to the protections of legal professional privilege, any person required to be interviewed pursuant to the FCA's statutory powers is formally compelled to attend and to answer questions. Failure to do so is treated as a contempt of court, and therefore presents a risk of imprisonment, unless the individual can show that he had a reasonable excuse for his failure to comply. However, because the individual has no right to silence there is a restriction on the use to which his compelled statement can be used. Except in very limited circumstances, a statement obtained in this way is inadmissible in any criminal or market abuse proceedings in which the interview subject is the accused.[9]

Since the same protection clearly does not apply to a person who voluntarily provides a statement, there is almost never any advantage to be gained from attending an interview voluntarily. If a person receives a request voluntarily to attend an FCA interview, whether at the request of an overseas regulator or not, they would be well-advised to respond asking the FCA to use their statutory powers of compulsion. This course of action has no downside for the individual as far as the UK position is concerned—the FCA will be expecting the request and will in no way view it as uncooperative.

Although the compelled interview will be inadmissible in UK criminal proceedings, there may still be a question over its evidential status in a criminal prosecution initiated in the jurisdiction of the overseas regulator. Clearly that issue will turn on the law of that jurisdiction. Given that risk, those advising interviewees should request, in advance of the interview, that the FCA obtain an undertaking from the overseas regulator that any compelled information will not be used in any criminal proceedings. There is no statutory requirement for the FCA to seek and obtain such an undertaking, although in practice they appear to be doing so in circumstances where the overseas regulator has criminal prosecution powers. In any case, if the FCA failed to offer such a protection, the interviewee would arguably have a 'reasonable excuse' for not complying with the request to be interviewed. The power of compulsion is predicated on an individual being afforded a protection, born of their privilege against self-incrimination in criminal proceedings. If the FCA refused to seek an appropriate assurance from the overseas regulator, that statutory protection would risk being compromised, albeit in an overseas jurisdiction.

The position is less clear-cut in relation to non-criminal proceedings initiated in the jurisdiction of the overseas regulator. The privilege against self-incrimination in the UK extends only to criminal proceedings: with the exception of enforcement action for alleged market abuse, there is nothing preventing statements made by an individual in regulatory proceedings from being used against that individual for enforcement purposes. Where an overseas jurisdiction recognises the privilege against self-incrimination in *regulatory* as well as criminal proceedings, there is clearly a risk that the regulatory authorities of that jurisdiction could circumvent the privilege afforded domestically by relying on compelled evidence obtained in the UK. In order to ensure maximum protection in these circumstances, those advising interviewees should consider making clear at the start of the recorded FCA interview that the client is answering questions under compulsion, and that he does not waive his privilege against self-incrimination.

Although the FCA should have conduct of the interview and retain control throughout, it may direct that a representative from the regulator can participate.[10] Before agreeing to such participation, the FCA is required, under statute, to satisfy itself that the regulator will abide by the applicable rules and safeguards concerning the confidentiality of the information obtained (addressed below). In addition, as a matter of policy, the FCA is obliged to consider how the interview will be conducted and the role that a regulator's representative will play. If the FCA agrees to issue a direction concerning participation, these determinations should be set out in that direction.[11] Under the policy in DEPP, the interviewee should normally be given a copy of this direction in advance of the interview, unless the disclosure of the document is considered liable to frustrate the investigation itself.[12]

The policy under DEPP also provides that the FCA will inform the interviewee of the following: whether they themselves are under investigation; the identity of the overseas regulator; and the general nature of the matter under investigation. As above, this information should be disclosed in advance of the interview, unless the doing of such would frustrate the investigation. If the interviewee is the person under investigation, the FCA will generally disclose the written notice appointing the investigators.[13] The FCA has a discretion whether to disclose, in advance of the interview, any documents on which it intends to ask questions.[14] In practice the FCA will normally defer to the overseas regulator on issues of disclosure.

Onward disclosure of confidential information

Generally, any information obtained by the FCA, for the purposes of or in the discharge of their function, is considered confidential material. As such there are restrictions on its onward disclosure.[15] Disclosure of confidential material in violation of the applicable Regulations is a criminal offence. However, a key exception to the general prohibition is where disclosure is sought for the purposes of criminal proceedings, which have or may be initiated.[16] Outside of criminal proceedings the gateways through which material can be disclosed to foreign regulatory authorities are (unsurprisingly) quite porous, as long as the disclosure is made for the purposes of enabling or assisting the recipient to discharge its functions.

However, for any disclosure of confidential information, the Regulations prohibit the recipient from using the information in breach of any condition as to the use to which the information can be put. To that extent, it may be worth seeking to clarify with the FCA the terms under which any information will be (or has been) disclosed to an overseas regulator. The violation of any conditions *may* amount to a legal basis, in the jurisdiction where the regulator is based, on which to challenge the admission or use of such information in any proceedings or action.

Conclusion

Whilst it is difficult to prevent the FCA from exercising its powers at the request of an overseas regulator, some basic protective measures can be taken. The interviewee should request the information and documents which, under DEPP, should typically be made available, namely: the direction allowing participation of the overseas regulator; the notice of appointment of investigators; and a general description of what the investigation concerns. Furthermore, interviewees should be extremely wary of any request to be interviewed voluntarily and invite the FCA instead to conduct the

interview under its compelled powers. Interviewees would also be well-advised to seek clarification from the FCA, at the outset, regarding the uses to which the compelled information will be put and whether it proposes to place any restrictions on the overseas regulator in that regard.

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[1] http://www.cityam.com/232508/overseas-regulators-increasingly-asking-the-financial-conduct-authority-for-assistance-hiking-up-the-compliance-burden-for-uk-businesses?ITO=hitc

[2] This note deals expressly with the FCA. However the statutory powers apply equally to the Prudential Regulation Authority.

[3] See *Financial Services Authority v Amro International* [2010] EWCA Civ 123, paragraph 39.

[4] *FSA v Amro* paragraph 43

[5] Those persons considered "connected" with an authorised person are listed at s 165(11) and in Part 1 of Schedule 15. An employee of an authorised person is connected to it for the purposes of the Act.

[6] *FSA v Amro* paragraph 57

[7] As per section 171. "Connected persons" here are the same as in section 165, see above.

[8] As per section 172

[9] Section 174 (2)

[10] Section 169(7)

[11] DEPP 7.2.6

[12] DEPP 7.2.12

[13] DEPP7.2.12. but note that there is no statutory requirement to provide the notice, see paragraph 44 *Amro*

[14] DEPP 7.2.15

[15] Section 348 FSMA

[16] FSMA (Disclosure of Confidential Information) Regulations 2001, regulation 4.