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27 October 2017

Our Ref: FOI5015

Dear

## **Freedom of Information: internal review**

I refer to your e-mail dated 24 July 2017 asking for an internal review of the Financial Conduct Authority's ("FCA") response, dated 25 May 2017, to your information request made under the Freedom of Information Act 2000 ("the Act"). This relates to the Section 166 Skilled Persons Report produced on the treatment of small and medium sized enterprise ("SME") customers referred to RBS Global Restructuring Group ("GRG").

Your original information request made under the Act, contained in your e-mail dated 25 February 2017, was:

- "1. *All 2016 written communication between Promontory, Mazars, FCA and RBS in relation to investigation and publication (or otherwise) of the report into GRG treatment of SMEs.*  
*[Request clarified to be for correspondence relating to the PUBLICATION or otherwise of the report into GRG – not all publications.]*
2. *The Minute of relevant FCA committee in 2016 that considered the report and its publication (or not).*
3. *The relevant committee meeting Minute/note within the FCA in 2016 which considers final report by Promontory and made a decision as to its publication (or otherwise).*
4. *The total cost of the investigation (including expenses or other non-fee based costs)."*

### **Preliminary**

In our original response dated 25 May 2017, we stated that we hold the information you are

seeking. However, we were unable to disclose it to you as we consider that it is exempt under the following exemptions:

- Section 31 (Law enforcement);
- Section 42 (Legal professional privilege);
- Section 43 (Commercial interests);
- Section 44 (Prohibitions on disclosure).

### **Internal review**

As you may be aware, we would normally aim to complete a review within 20 working days. In this case the review has taken considerably longer, for which I apologise.

I have now had an opportunity to review our original response. The conclusion of my internal review is that I consider that we interpreted the scope of point 1 of your request broadly at the first stage by considering all material in which publication of the Skilled Persons Report (the Report) was discussed. I have therefore considered whether the scope could be limited to only those parts of the FCA Board and Committee Papers and Minutes in which publication of the Skilled Person Report is discussed. Please note I have not considered discussions about the substance of the Report.

### Outcome

Firstly, it may be helpful if I explain that some relevant information has recently been placed in the public domain via letters passing between Andrew Bailey and Nicky Morgan at the Treasury Select Committee which includes confirmation of the FCA's intention to publish a detailed summary of the Section 166 Skilled Persons Report:

<https://www.parliament.uk/documents/commons-committees/treasury/Bailey-Morgan-GRG-110917.pdf>.

As you will no doubt have seen, the FCA published the 'interim summary' of the Report on 23 October.

Against that background, I am now able to provide you with some further information about publication of the Report. This is contained in Annex B to this letter.

I am also satisfied that the remaining information you have requested is covered by the following exemptions which I explain in detail in Annex A to this letter:

- Section 36 (Prejudice to effective conduct of public affairs);
- Section 31 (Law enforcement);
- Section 42 (Information where a claim to legal professional privilege could be maintained in legal proceedings);
- Section 43 (Commercial interests); and

- Section 44 (Prohibition on disclosure by virtue of section 348 of FSMA).

Furthermore, where qualified exemptions apply, the Qualified Person and I are satisfied that the balance of the public interests comes down in favour of not disclosing some of the information you have requested.

My apologies for the length of this reply but I want to explain how the Qualified Person and I reached our decision and, in so doing, to set out the matters we have taken into account.

#### Conclusion

To conclude, we are satisfied that the information you have requested is covered by the exemptions cited and that they have been applied correctly. However, the balance of the public interests is now in favour of disclosing some information to you which is contained in Annex B to this letter.

I realise you may be disappointed not to receive all of the information you requested, but I hope this letter explains clearly Mr Griffith-Jones' decision on the application of section 36 of the Act and also my decision on our application of the other exemptions cited, and why we cannot disclose to you all the information you have requested.

If you are not content with the outcome of the internal review, you have a right of appeal to the Information Commissioner at the following address: *Information Commissioner's Office, Wycliffe House, Water Lane, Wilmslow, Cheshire, SK9 5AF. Telephone: 01625 545 700, Website: [www.ico.org.uk](http://www.ico.org.uk).*

Yours sincerely

**Greg Choyce  
Internal Reviewer**

## **Annex A**

### **Financial Conduct Authority (“FCA”)**

#### **Freedom of Information Request – (FOI5015)**

This annex provides more detail on the exemptions in section 36 (Prejudice to effective conduct of public affairs); section 31 (Law enforcement); section 42 (Legal professional privilege); section 43 (Commercial interests) and section 44 (Prohibitions on disclosure) of the Act applied to the information requested from the FCA with the reference FOI5015.

#### Section 36 (Prejudice to the effective conduct of public affairs)

We are unable to disclose all the requested information to you as we consider some of it is exempt under section 36 of the Act (Prejudice to the effective conduct of public affairs). This exemption applies if, in the reasonable opinion of one of the FCA's Qualified Persons, disclosure of the information would be likely to inhibit the free and frank provision of advice or the free and frank exchange of views for the purposes of deliberation. Section 36 is a qualified exemption which means that, even though the exemption applies, the public interests for and against disclosure of the information have to be balanced.

Each of the FCA's Board members is a Qualified Person and your request was considered by John Griffith-Jones, the FCA's Chairman.

Mr Griffith-Jones has reviewed those parts of the FCA Board and Committee Papers and Minutes in which publication of the Report is discussed. Mr Griffith-Jones has also taken into consideration the points made in your internal review request dated 24 July 2017.

Mr Griffith-Jones' opinion is that the exemption in section 36(2)(b)(i) and (ii) applies to some of the information requested, as public disclosure would be likely to harm the "free and frank provision of advice" to or the "free and frank exchange of views for the purposes of deliberation" within the FCA's senior management.

Mr Griffith-Jones has therefore gone on to consider the public interest arguments (both for and against disclosure) that apply at this time and has concluded that on balance some information can now be disclosed to you.

I explain below why, in his opinion, the exemption applies and it is not in the public interest for the remaining information to be disclosed.

Mr Griffith-Jones considers that the FCA Board and its Executive Committees, as the FCA's senior decision making bodies, need to have what is described in decisions under the Act as a "protected space" in which to have open, candid and uninhibited discussions when contemplating, in this case, publishing the Report. For the FCA to make fully informed decisions, there have to be open and uninhibited discussions between Board and Committee members, and between members and presenters on highly sensitive regulatory issues. Presenters need to feel confident that sensitive information, setting out a range of options, a candid analysis of the strengths and weaknesses of those options and the risks that each poses, will not be publicly

disclosed. They have to be able to express themselves openly, honestly and completely so that these matters can be properly debated. If these discussions are disclosed publicly, members or presenters might be deterred from putting forward options, analyses and risks. This would be likely to inhibit or lower the quality of exchanges, advice and deliberation in the future.

Given the sensitive nature of the issues considered in this case, public disclosure of these particular papers and minutes would be likely to attract widespread attention and comment. Mr Griffith-Jones also considers that there would be a reasonably high risk of inhibiting the views and advice given to the FCA Board and its Committees (whether in writing or orally).

As section 36 is a qualified exemption and is subject to the public interest test, Mr Griffith-Jones considered the following factors for and against disclosure. I should explain that we usually carry out the public interest test as at the date of the first response to the requester. We believe this is consistent with the guidance of the Information Commissioner's Office. In the case of your own request this was 25 May 2017. However, Mr Griffith-Jones has decided in this case to carry out the exercise now, taking into consideration the information that has become public since May.

#### *For disclosure*

- The Board and its Committees are an important decision-making body of the FCA and the information would provide further insight into the views of senior management on a highly topical issue such as publication of the Report.
- With the FCA's recent publication of the 'interim summary' of the Report, there is an interest in understanding why the Report itself has not been published.
- More generally, public disclosure would also promote openness and transparency around significant decisions made by the FCA and allow more informed comment about those decisions. Informed comment should lead to better quality decisions by the Board and Committees and so by the FCA, as well as increasing stakeholders' sense of engagement in the regulatory regime.
- It would also allow the public to build an informed view on whether the FCA is functioning effectively and efficiently and, in particular, how the FCA has responded and intends to respond to a major issue affecting a class of consumer, by shedding more light on the decision not to publish the Report. This will in turn allow an assessment to be made of the processes that have been followed to reach this decision.

#### *Against disclosure*

- The lack of open and uninhibited exchanges of views within and advice to the Board and Committees, and between the Board, Committees and FCA staff would be likely to harm the quality of decisions made by the FCA, its overall effectiveness and hence the conduct of the FCA's public affairs.

- The requested information relates to a current issue and cannot be regarded as being of historic interest only. As was noted in the FCA's Press Release of 23 October, the FCA is currently carrying out a more focused investigation following consideration of the Report. The FCA is therefore still considering our options and contemplating what action may be the appropriate regulatory response, taking into account the Skilled Persons findings.
- As distinct from decisions the FCA's Board makes on important policy issues (typically making rules), the present request relates to the regulation of a particular firm. There are good public interest as well as legal reasons why the FCA is unable to publish ad hoc information about individual firms.
- Disclosure of the information would also be likely to prejudice the FCA's ability to conduct similar reviews in the future as firms becoming less willing to engage openly and on a timely basis with the skilled person if they believe that a report of the review will be made public.

To conclude, Mr Griffith-Jones is satisfied, notwithstanding the points you have raised, that the public interest favours maintaining the exemption in section 36 of the Act and protecting from disclosure some of the information you have requested.

I should add that the FCA's reliance on the other exemptions in the Act which we have previously cited (see above) have not been reviewed by Mr Griffith-Jones, as these exemption do not require a Qualified Person to give an opinion on their application. I have therefore reviewed the use of these exemptions.

#### Section 31 (Law enforcement), Section 42 (Legal professional privilege) and Section 43 (Commercial interests)

In order not to lengthen unduly this letter, I can say that I have reviewed our previous response and I am satisfied that the above exemptions still apply to some of the information you have requested.

As the exemptions are qualified, they are subject to the public interest balancing exercise. I have taken into account the time that has passed since our previous response, the additional information which has become publicly available in the interim, including to the publication of our interim summary of the Report on 23 October and Mr Griffiths-Jones' opinion on the balance of the public interests as set out above. I consider that the balance of the public interests, as set out in our previous response, continues to come down in favour of not disclosing publicly all the information you have requested.

#### Section 44 (Prohibitions on disclosure)

Section 44(1)(a) of the Act provides that information is exempt from disclosure if its disclosure (otherwise than under the Act) is prohibited by or under any enactment.

Section 348 of FSMA restricts the FCA from disclosing "confidential information" it has received except in certain limited circumstances (none of which applies here). Section 348 of FSMA, which triggers the exemption in section 44 of the Act, is a self-contained regime and does not depend

for its operation on more general legal or lay concepts of confidentiality. If the tests in section 348 are met, the restriction on disclosure applies.

If I may explain further, under section 348(5)(a) FSMA, the FCA is identified as a primary recipient for the purposes of Part XXIII FSMA and therefore section 348(1). In addition a "skilled person" appointed under section 166 FSMA is listed in section 348(5)(d) of FSMA as a primary recipient. Section 348 FSMA restricts the FCA from disclosing "confidential information" it has received in carrying out its regulatory functions except in certain limited circumstances (none of which applies here). In this case, some of the information you have requested falls within section 44(1)(a), as it relates to confidential information that was received by the FCA from RBS and Promontory about the Report. The information relates to our supervisory functions of monitoring how firms comply with our rules for treating customers fairly and of engaging and liaising with the skilled person and RBS about the Report. In addition, as the FCA contracted directly with the skilled person, information about the costs incurred has been received by the FCA from the skilled person, before being recovered from RBS. We are, therefore, also unable to provide you with the costs of the Report, as doing so would amount to disclosing information which relates to the business or other affairs of the skilled person: the criteria in section 348 FSMA are met and the information requested falls within section 44(1)(a) of the Act.

I am also satisfied that section 348 FSMA applies to information in the form of the FCA's internally-created information, including its views and advice, where the "created" information incorporates information received by the FCA from an external party. In other words, disclosure of the "created" information would disclose the content or nature of the confidential information which has been received by the FCA, given the "inextricable link" between these types of information. This principle has also been accepted by the Information Commissioner in other cases (see for example paragraphs 19 to 23 of decision FS50468587, upheld on appeal). As such, the confidentiality regime in FSMA triggers the exemption in section 44(1)(a) of the Act and the information is exempt from disclosure.

In addition, I would make the following observation. In other cases before the Court of Appeal and the Information Rights Tribunal, the significance has been recognised of section 348 FSMA within the regulatory regime. In summary, the objects are to protect the privacy of persons providing information to the FCA; and to assist in the exercise by the FCA of its regulatory functions, by encouraging the free-flow of information to the regulator.

If I may, I should also like to comment on section 348(4) FSMA which states that information is not confidential if (a) it has already been made legitimately available to the public; or (b) it can be summarised or so framed that it is not possible to ascertain from it information relating to any particular person. I consider that sub-section (4) is not a relevant consideration in this case, other than in relation to any information that might already be in the public domain, because (a) the remaining information falling within this exemption is not publicly available and (b) it would be impossible for us to make the information anonymous, as it is clearly identifiable as relating to the subject matter named in the request (i.e. communications about publication of the Section 166 Skilled Persons Report on RBS GRG).

Furthermore, in terms of consent, I can confirm that in this case we have not sought consent. In the Information Tribunal case of '*Norman Slann and The Information Commissioner and Financial Services Authority*' (EA/2005/0019) the Tribunal accepted that, if we do not have consent, the Act's regime cannot make us seek it.

Therefore, provided the criteria for information being “confidential” set out in section 348 FSMA are met, which in this case I consider they are, there is a statutory bar from the FCA disclosing confidential information we have received from an external party. As such, I am satisfied that section 44(1)(a) of the Act applies to the information requested, as this is covered by section 348 FSMA. As section 44 of the Act is an absolute exemption there is no need for the FCA to consider whether there might be a stronger public interest in disclosing the information than in not disclosing it.