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10 January 2018

Our Ref: FOI5391

Via Email

Dear

Freedom of Information: Right to know request

Thank you for your request under the Freedom of Information Act 2000 ("the Act") for the following information:

- "1. Transcripts of communications between the FCA and the Advertising Standards Authority (ASA) from May to July 2016 which culminated in the handing over of complaints investigations in the payment services sector from the ASA to the FCA.*
- 2. The updated MOU between the FCA and the ASA which includes the decision made in point 1. above*
- 3. Clarification as to who is now the competent authority for investigating advertising complaints about the payment services sector.*
- 4. A list of payment services firms which the FCA has investigated for misleading advertising and the results of those investigations."*

Firstly, please accept our apologies for the time it has taken to respond to all aspects of your original request.

As you are aware, we contacted you on 20 November 2017, on 18 December 2017 and again on 4 January 2018 to advise that we needed more time to consider whether the balance of public interest in the retention of information outweighed the public interest in its disclosure.

I can confirm we have now completed this exercise and the outcome is detailed below.

Further, in our latest email dated 4 January, we also confirmed that we were able to address questions 2 and 3 of your request and we responded to both questions outside the Act. However, I understand that you remain dissatisfied with our approach, and you feel our response to both questions was not satisfactory. I am therefore providing additional clarification on both questions below.

Question 1:

I can confirm that we hold the information you have requested and some of that information is attached in Annex B. For ease of reference, we have named each communication thread as 'Transcript 1', 'Transcript 2', etc.

With regard to the remaining information we hold, we are unable to disclose it to you, as we are of the view that the exemptions in section 40(2)(b) (Personal Information), section 44 (Prohibitions on disclosure), section 43 (Commercial interests), and section 31(2) of the Act are engaged. In terms of the application of the qualified exemptions in sections 31 and 43 of the Act, we are satisfied that the public interest in favour of disclosure is outweighed by the public interest in maintaining the (relevant) exemption. The transcripts contained in the enclosed Annex B have therefore been redacted to remove any information which is exempt from disclosure under any of the above sections of the Act.

For further details as to why these exemptions apply, please refer to Annex A below.

Question 2 and question 3:

In your email dated 4 January 2018, you have expressed some concerns about our decision to handle these two questions outside the Act and about the nature of the information you have been provided with, which you feel does not comply adequately with either question.

Your concerns have been noted and, by way of clarification, I would like to explain that the ASA made a decision that *"as of 22 July 2016, complaints about misleading non-broadcast advertising for [payment] services will be referred to the FCA for its consideration"*. Confirmation of this can be seen on the ASA's website [here](#).

I can also confirm that there is no formal written agreement to that effect and that the MoU of 2014, which we previously provided you with the link to (available [here](#)) is the only MoU in place between the ASA and FCA.

However, as advised in our previous response, we have publicly set out the relevant legal and regulatory framework in which Payment Institutions and Electronic-Money Firms operate; most recently in our 19 July 2017 statement, which can be seen [here](#). Furthermore, we have made it clear that all firms undertaking currency transfer services must comply with the Consumer Protection from Unfair Trading Regulations 2008 (CPRs).

Question 4:

We have previously disclosed publicly that we have concerns about payment services firms who may have used currency converter tools in relation to their currency transfer services in a potentially misleading way. As we stated publicly on 19 July 2017, *"we subsequently commenced investigations into a number of payment institutions whose promotions we consider to be potentially misleading as a result of their use of the interbank rate (which was not available to customers) in an online currency converter tool and in other promotional material."* Our statement can be seen [here](#).

We understand that this is the misconduct that you are referring to in your request when you describe "payment services firms" which may have provided "misleading advertising".

I can confirm that, within the timeframe relevant to your request, we have commenced six investigations in relation to potentially misleading financial promotions through the use of the interbank rate in online currency converter tools and other promotional material. Some of these investigations have been completed and those firms have stopped promoting their business through the use of interbank rates (we cannot impose financial penalties or other disciplinary sanctions in these cases - hence the absence of Final Notices). Please note, however, we are unable to provide specific information about these investigations, including the names of the firms, as we consider that the identification of any of the firms involved would, or would be likely to, prejudice the commercial interests of the firms concerned, and therefore the exemption set out at section 43 (Commercial Interests) of the Act applies.

Furthermore, disclosure of this information relating to ongoing investigations would, or would be likely to, prejudice the exercise by the FCA of its regulatory functions under FSMA. We are therefore of the view that this information is exempt from disclosure under section 31 (Law enforcement).

Please see Annex A for further details on why these exemptions apply.

Yours sincerely

Information Disclosure Team



[Your right to complain under the FoI Act](#)

If you are unhappy with the decision made in relation to your request, you have the right to request an internal review. If you wish to exercise this right you should contact us within three months of the date of this response.

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

Annex A

- **General right of access to information held by public authorities**

Under section 1(1)(a) of the Act, any person making a request for information to a public authority is entitled to be informed in writing by the public authority whether it holds information of the description specified in the request. If the public authority holds information of the type specified in the request, the person requesting the information is entitled under section 1(1)(b) to have the information communicated to them. The rights in section 1(1)(a) and (b) are, however, subject to a number of exclusions and exemptions, including the following:

- **Section 40 (Personal information)**

To the extent that the information that we hold may contain personal data about individuals, section 40(2)(b) of the Act provides that "Any information to which a request for information relates is also exempt information if ... either the first or second condition below (see sections 40(3) and 40(4) of the Act) is satisfied".

We have applied this exemption because the first condition (as stated in section 40(3) of the Act) would be satisfied if the information requested comprises the personal data of individuals other than yourself which, if disclosed, would breach the Principles in the Data Protection Act ("the DPA"). The individuals concerned do not have an expectation that their names would be disclosed to the public at large and doing so would not be fair to them. They have not given their consent for their personal data to be made public and, to do so, would be a breach of Principle 1 of the DPA.

In line with the FCA's policy, the information that has been redacted consists of the names of current or former FCA staff below management level and their direct FCA telephone numbers, as well as the names of representatives of other organisations.

Section 40 is an "absolute" exemption, and so it is not necessary to consider the public interests for and against disclosure of the information falling within this exemption.

- **Section 43 (Commercial interests)**

Section 43(2) of the Act provides that information is exempt if its disclosure would, or would be likely to prejudice the commercial interests of any person (including the public authority holding it).

The commercial interests of the firms in question may be harmed in several ways by disclosing the information requested. Disclosure of the information you have requested would be likely to lead to comment and speculation about the firms, which would harm the commercial interests of the individual firms and their stakeholders, including their employees.

Section 43 is a qualified exemption and we have therefore considered, as required by the Act, where the balance of public interest lies.

For disclosure:

- *There is a strong public interest in favour of transparency and in the public being reassured about the effectiveness of our regulatory approach.*
- *Disclosure of the information would demonstrate how we respond to matters arising within the sector we regulate and would enable regulated firms and their senior management to better understand why and how we make decisions.*

Against disclosure:

- *It is strongly in the public interest that the FCA has open and candid exchanges of information with the firms it regulates, regardless of the commercial sensitivity of the information.*
- *There is a strong public interest that statutory procedures setting out due process are followed. Firm and public confidence in the regulator could be prejudiced as disclosure outside the regulatory regime could affect the brand and reputation of firms or individuals involved in the absence of due process having been followed – i.e. in the absence of any formal public announcement and without the relevant markets and/or entity having had the opportunity to comment.*

As there is no routine public disclosure of a firm or individual's dealings with the FCA, ad hoc public disclosure under the Act would be likely to attract a disproportionate amount of attention to those concerned.

- *In these types of cases, where obtaining a private, agreed, regulatory outcome with the firm is the quickest and most effective way of preventing ongoing harm to consumers, it is usually not in the public interest to disclose these agreements to the public. It would be unfair to prejudice a firm's commercial interests, where it has fully co-operated with us and where measures are in place to prevent the misconduct from re-occurring. If firms knew that their identity would be exposed and their commercial interests would suffer, they would not be incentivised to seek agreed regulatory outcomes with us; which in turn could put consumers at risk.*

We have balanced the public interest for and against disclosure as required by the Act. In this case, in our view the public interest lies against disclosure for the reasons set out above.

- **Section 44 (Prohibitions on disclosure)**

Section 44 of the Act provides that information is absolutely exempt if its disclosure (otherwise than under the Act) is prohibited by or under any enactment. Section 91 of the Financial Services (Banking Reform) Act 2013 (FSBRA) restricts the PSR from disclosing "confidential information" it has received except in certain limited circumstances, none of which apply here.

Confidential information for these purposes is defined as information which relates to the business or other affairs of any person and which was received for the purposes of, or in the discharge of, any functions of the PSR under FSBRA and which is not in the public domain.

It is also possible for "received" information to be embedded within information created by the FCA and such information is also exempt from disclosure under section 44 of the Act. Consequently the FCA is prohibited from disclosing to you any information which we received while performing our regulatory duties and which is not in the public domain or where the relevant consents have not been obtained.

The information that we hold and which is within the scope of your request has been received for the purpose of carrying out our regulatory functions, so falls within section 91 FSBRA. Disclosure of confidential information in breach of section 91 of FSBRA is a criminal offence.

This exemption is an "absolute" exemption, and so it is not necessary to balance the public interest for and against disclosing the information.

- **Section 31 (Law enforcement)**

The qualified exemption in section 31(1)(g) of the Act applies (for the purpose set out in 31(2)(c)) because disclosure of the information requested would, or would be likely to, prejudice the exercise by the FCA of its functions for the purposes of ascertaining whether circumstances which would justify regulatory action in pursuance of any enactment exist or may arise.

This exemption is qualified and we have balanced the public interest for and against disclosure as required by the Act.

For disclosure:

- *There is a strong public interest in favour of transparency and in the public being reassured about the effectiveness of the regulatory approach taken by the FCA and disclosure of the information would demonstrate how the FCA responds to matters arising within the sector it regulates. There is a strong public interest in the public being aware of any enquiries, considerations or actions the FCA may be taking in relation to the markets, firms or individuals who are, or may be, operating in the financial services industry.*
- *Disclosure would also provide information to consumers to assist them in making decisions about their dealings or potential dealings with the firms and individuals that are, or may be, operating in the financial services industry.*
- *Disclosure of the information would increase public awareness and understanding of decisions taken by the FCA.*

Against disclosure

There is a strong public interest in the FCA being able to carry out its functions in the most effective manner possible, and disclosure of this information has the potential to prejudice any work we may presently be doing, as well as our ability to carry out enquires effectively in the future

because, for example, firms or third parties would be less willing to engage in dialogue with the FCA or provide information voluntarily to the FCA.

- *We consider that the information discussed in some of the redacted material referred to in question 1 may reveal to the public details of the strategies and tactics used in our supervision of the firms we regulate. This could affect the way that the FCA interacts with firms, and ongoing and future investigations could be prejudiced.*
- *Disclosure of the information could also lead to widespread speculation which could hinder and prejudice the progress of any current and/or future FCA enquiries, considerations and/or action that may be taken.*

On this occasion we have concluded that the balance of the public interest is in favour of not disclosing the information, for the reasons set out above.