

MEMORANDUM OF UNDERSTANDING
BETWEEN
FINANCIAL CONDUCT AUTHORITY
AND
INSOLVENCY SERVICE

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INTRODUCTION

1. This Memorandum of Understanding (MoU) sets out at a high level the agreement between the Insolvency Service (IS) and the Financial Conduct Authority (FCA) that governs the exchange of information to better deliver the objectives of both organisations. It should be noted that 'exchange' covers all transfers of information between both organisations.
2. Information will only be exchanged where it is lawful to do so. The relevant legal bases for exchanging information are detailed within this MoU.
3. The purpose of this MoU is to establish a framework for cooperation between the IS and the FCA. It sets out (i) the role of each organisation; and (ii) explains the intention to work together and cooperate proactively in matters of common interest. Its aim is to outline the ways in which the IS and the FCA will exchange information and intelligence to further the objectives of each organisation.
4. Although this MoU is not legally binding and does not in itself create a lawful means for the exchange of information, it has an essential role in documenting the processes and procedures agreed between both organisations.
5. This MoU should not be interpreted as removing or reducing existing legal obligations or responsibilities on each organisation, including as data controllers under the Data Protection Act 1998.

THE ROLE OF THE INSOLVENCY SERVICE (IS)

6. The IS is an executive agency of the Department for Business, Energy and Industrial Strategy (BEIS). It fulfils a range of statutory functions and delivers a range of public services on behalf of the Secretary of State. It exercises powers and duties on behalf of the Secretary of State arising under the Insolvency Acts 1986 and 2000, the Company Directors Disqualification Act 1986, the Employment Rights Act 1996 and the Companies Acts 1985 and 2006, as well as under secondary legislation relating to these Acts.
7. The IS has numerous powers and responsibilities ranging from the statutory role of trustee and liquidator, to policy, redundancy payments and regulation of the insolvency profession, to investigation and enforcement work tackling corporate misconduct, financial wrongdoing and fair markets.
8. Of particular relevance to this MoU is that:
 - the IS has the power to conduct confidential enquiries into a company's affairs under the provisions of the Companies Act 1985 in cases where there is reason to believe the company's activities are being conducted in a manner contrary to the public interest;
 - the IS also has the power to investigate the affairs of companies entering insolvency and of individuals entering bankruptcy or debt relief;
 - as a result of these investigations the IS has powers to seek the disqualification of directors or the bankruptcy or debt relief restriction of individuals whose conduct falls below the required standard as well as to

petition for the winding up of companies where it is in the public interest to do so.

9. The IS is also responsible for both investigating and prosecuting breaches of company and insolvency legislation as well as fraudulent activity arising in the context of insolvency.
10. The IS also supports the work of the Official Receiver (OR). ORs are appointed, removed and act under the general direction of the Secretary of State for BEIS. The OR's primary function is to administer and investigate the affairs of companies and partnerships wound up by the court and of individuals made bankrupt, with a view to taking appropriate and timely action where there is evidence of offences or unfit conduct.

THE ROLE OF THE FINANCIAL CONDUCT AUTHORITY (FCA)

11. The FCA is established under the Financial Services and Markets Act 2000 (FSMA) as the market conduct regulator in the financial services sector. The FCA is responsible for:
 - making and enforcing rules governing the conduct of regulated firms;
 - regulating standards of conduct in retail and wholesale markets;
 - supervising trading infrastructure that supports those markets;
 - the prudential supervision of firms that are not regulated by the Prudential Regulation Authority; and
 - the functions of the UK Listing Authority (UKLA).
12. The FCA has a single strategic objective to ensure that the relevant markets function well. It also has three operational objectives:
 - to secure an appropriate degree of protection for consumers (including wholesale consumers);
 - to protect and enhance the integrity of the UK financial system; and
 - to promote effective competition in the interests of consumers.
13. The FCA does this by oversight and regulation of the UK financial markets which includes:
 - authorisation of individuals who carry on regulated activities;
 - a market-based approach to the supervision of firms in the financial services sector;
 - investigation and enforcement activity against firms and individuals who are carrying out or purporting to carry out financial services (with or without authorisation);
 - exercising powers under the Competition Act 1998; and
 - bringing criminal prosecutions, including in appropriate cases of market abuse and serious unauthorised business.

GENERAL COOPERATION

14. To fulfil their duties and obligations the IS and the FCA need to be able to share information, in particular information relating to misconduct, investigations and enforcement within their respective remits, and need to be able to support each other in achieving their objectives for the benefit of the public and UK economy.
15. There is an inherent public interest in the IS and the FCA robustly using their powers to tackle corporate and financial misconduct and the commission of financial crime. Information sharing wherever possible and appropriate will assist both organisations to meet this objective. Hence the 'lawful reason' for the sharing of information under this MOU is the public interest inherent in both organisations being able to carry out their functions and duties effectively.
16. The arrangements set out in this MoU are intended to ensure a better understanding of the roles and responsibilities of the respective organisations, and to provide an auditable structure and process to facilitate the regular exchange of information between the two. This enables both organisations to share information (including personal data) in a lawful and proportionate manner, and establishes the legitimate purpose for the sharing of material and the means by which it will be defined and managed.
17. This MoU supports the following objectives of the organisations:-
 - FCA: Ensuring that the relevant markets function well, protecting consumers, enhancing the integrity of the UK financial system and promoting effective competition.
 - IS: Delivering economic confidence by supporting those in financial distress, tackling financial wrongdoing, and maximising returns to creditors.

LEGAL

18. The IS and the FCA both have statutory powers of investigation and enforcement under their respective legislation. They also acquire intelligence to inform decisions about whether or not to exercise these powers.
19. The IS and the FCA aim to cooperate by sharing information where it is judged to be helpful to both organisations in fulfilling their respective functions, subject to any restrictions on disclosure of information and compliance with the law.
20. In line with Ministry of Justice guidance on data sharing between public bodies, both organisations must: (i) have the power to share or receive the data; and (ii) comply with all legal provisions concerning the use of personal data.
21. Both organisations are legally obliged to handle personal information according to the requirements of data protection legislation (until May 2018 this will be the Data Protection Act 1998 (DPA) which will then be replaced by the General Data Protection Regulation (EU) 2016/679 (GDPR)) and the

Human Rights Act 1998 (HRA). Both organisations therefore undertake to comply with the requirements of the DPA, the GDPR when it replaces the DPA and the HRA in the operation of this MoU.

22. In receiving any 'personal data' through the gateways set out below or otherwise, the IS and the FCA will comply at all times with the DPA and subsequently, the GDPR.

The IS

23. The IS may share with the FCA material obtained as a result of the exercise of powers under the Companies Act 1985 by reason of the provisions of section 449 Companies Act 1985 and Schedules 15C and 15D to that Act. Disclosure outside of these gateways is a criminal offence.
24. The IS has no specific disclosure gateways in respect of material obtained in the course of investigations carried out under the Insolvency Act 1986 by ORs as liquidators or the Company Investigation Teams under the Company Directors Disqualification Act 1986. However, the IS will share such information where there is a public interest in doing so.
25. There may be some occasions where information is subject to Legal Professional Privilege and as a result the IS will not share such information with the FCA.
26. However, in making such decisions, the IS will give careful consideration to whether that privilege should be specifically waived. In doing so, regard will be had to a range of factors including the potential for the sharing of such information to better deliver the objectives of the FCA.
27. Where information generated by the IS is subject to Legal Professional Privilege, the IS will consider whether such information can be shared with the FCA on the basis of a limited waiver of privilege. In considering whether such information can be shared, regard will be had to a range of factors including the potential for the sharing of such information to better deliver the objectives of the FCA. For the avoidance of doubt, that limited waiver will not, unless specifically agreed otherwise by the IS, allow the FCA to pass that information on or otherwise reveal it, in proceedings or otherwise.
28. Where the IS receives information from an external source which is subject to Legal Professional Privilege, the IS will not share that information with the FCA unless that privilege has been or is specifically waived, whether entirely or in favour of the FCA, by all those benefiting from it, or there are sufficient grounds to consider that the information was never truly privileged, whether having regard to the crime or fraud exception or otherwise.

The FCA

29. Section 348(1) of FSMA prevents the FCA from disclosing any 'confidential information' it receives except in certain circumstances as provided for under FSMA. Confidential information is defined in section 348 of FSMA broadly as any information which is not in the public domain, relating to the business or

other affairs of any person, which was received by the FCA for the purposes of, or in the discharge of, its statutory functions (see section 348(2) of FSMA). Where the information has lawfully been made available to the public or is in the form of a collection or a summary so that it cannot be attributed to a particular firm or individual, that information is not confidential information (see section 348(4) of FSMA).

30. The restriction on the disclosure of confidential information under section 348 of FSMA does not apply where the person from whom the information was received (and, if different, the person to whom the information relates) has consented to the disclosure of the material.
31. Section 349 of FSMA allows HM Treasury to make regulations to permit the disclosure of confidential information in certain circumstances. The Financial Services and Markets Act 2000 (Disclosure of Confidential Information) Regulations 2001 (SI 2001 no. 2188) (the Gateway Regulations) set out the circumstances in which disclosure may be made. Disclosure outside of the Gateway Regulations is a criminal offence.
32. The Gateway Regulations generally permit the disclosure of confidential information by the FCA to the IS under two main gateways:
 - (a) The first is where the disclosure of confidential information is made for the purposes of enabling or assisting the Secretary of State - BEIS, in discharging any of the public functions of BEIS or the FCA (see regulation 3(2) of the Gateway Regulations).
 - (b) The second is where the disclosure of confidential information is made by the FCA to BEIS for the purposes of initiating certain proceedings, or of facilitating a determination of whether they should be initiated (see regulation 5(6) of the Gateway Regulations).
33. The Gateway Regulations generally permit the disclosure of confidential information to the OR under three main gateways:
 - (a) The first is where the disclosure of confidential information is made for the purposes of enabling or assisting the FCA in discharging its public functions (see regulation 3(1)(a) of the Gateway Regulations).
 - (b) The second is where the disclosure of confidential information is made by the FCA to the OR for the purposes of initiating certain proceedings, or of facilitating a determination of whether they should be initiated (see regulation 5(6) of the Gateway Regulations).
 - (c) The third is where the disclosure of confidential information is made by the FCA to the OR for the purposes of enabling or assisting the OR in carrying out his/her functions under the Insolvency Act 1986 (see regulation 9 of the Gateway Regulations).
34. Before disclosing any confidential information, the FCA must have regard to any relevant restrictions on disclosure set out in the Gateway Regulations.

35. Any disclosure of confidential information by the FCA to the IS will result in the same duty of confidentiality being attached to the information when held by the IS as set out in FSMA and the Gateway Regulations.
36. The FCA may only use non-public information supplied by the IS under this MoU for any relevant purposes as described below.
37. The FCA will treat all non-public information supplied under this MoU, as well as any requests, the contents of such requests and consultations between the IS and the FCA pursuant to this MoU as confidential and will not disclose this information to any third party without first obtaining the consent of the IS. Where disclosure is required by law, the FCA will notify the IS and provide it with an opportunity to be heard prior to making any disclosures.
38. Where information generated by the FCA is subject to Legal Professional Privilege, the FCA will consider whether such information can be shared with the IS on the basis of a limited waiver of privilege. In considering whether such information can be shared, regard will be had to a range of factors including the potential for the sharing of such information to better deliver the objectives of the IS. For the avoidance of doubt, that limited waiver will not, unless specifically agreed otherwise by the FCA, allow the IS to pass that information on or otherwise reveal it, in proceedings or otherwise.
39. Where the FCA receives information from an external source which is subject to Legal Professional Privilege, the FCA will not share that information with the IS unless that privilege has been or is specifically waived, whether entirely or in favour of the IS, by all those benefiting from it, or there are sufficient grounds to consider that the information was never truly privileged, whether having regard to the crime or fraud exception or otherwise.

PRINCIPLES FOR EXCHANGING INFORMATION

40. The FCA and the IS will ensure timely and focussed exchange of relevant information that enables effective co-ordination and co-operation in the areas outlined in this MoU. Information available to one organisation that is relevant to the responsibilities of the other organisation will be shared when requested. Additionally, if one organisation considers that information it has gathered will be materially relevant to the other, it will proactively disclose such information to the other.
41. Subject to any restrictions on disclosure of information (confidential or otherwise) at law, the FCA and the IS will seek to apply the following principles when sharing information between the two organisations:

Intelligence

42. Both organisations need to be able to share information acquired as intelligence so that they can effectively decide whether to use their statutory powers of investigation and enforcement and be better informed about how and when to do so. This intelligence will cover a range of information from complaints or other information about individuals or firms, areas of shared interests consistent with both organisations' statutory powers and functions

including, for example, information relating to patterns and trends, or developing legal issues and statistical information.

43. The IS will use information provided for intelligence purposes to:
- Inform its decisions about whether or not to investigate a live company under powers contained in the Companies Act 1985;
 - Inform its decisions about appropriate targeting of directors of companies subject to insolvency procedures for disqualification;
 - Help identify trends and patterns of behaviour;
 - Further the exchange of information on legal developments and case law; and
 - Assist an OR to carry out his/her statutory duties of investigation.
44. The FCA will use information provided for intelligence purposes to:
- Inform its decisions about taking regulatory or other action against an individual or other legal entity;
 - Inform its decisions about commencing proceedings pursuant to section 367 or section 372 of FSMA; and
 - Inform its decisions about engaging its statutory powers of investigation.
45. It is envisaged that information provided as intelligence will be used by each organisation to help identify individuals or firms for targeted action; assist in targeting specified individuals or firms; or as part of an overall strategy to combat corporate or financial impropriety in relation to matters of specific concern or more generally. It cannot be relied upon evidentially.
46. Each organisation will ensure appropriate measures are in place to safeguard the security of the information and its sources.

Investigation

47. The IS has powers to require information from any person under the following provisions:
- Part XIV of the Companies Act 1985.
 - Section 7 of the Company Directors Disqualification Act 1986.
 - Sections 132, 235 & 236 of the Insolvency Act 1986.
48. The FCA has powers to obtain information under Part XI of FSMA.

Enforcement or other action

49. Information may be passed between the IS and the FCA to enable them to directly exercise their powers of enforcement. For example, the results of an FCA investigation may be passed (where and to the extent that the FCA is legally able) to the IS to enable a decision to be taken whether or not to seek

the disqualification of directors, to commence a criminal investigation or to petition to wind-up a company in the public interest.

50. The IS has powers under section 8 of the Company Directors Disqualification Act 1986 to seek the disqualification of a director or a person acting as or instructing an unfit director where it appears expedient in the public interest to do so on the basis of information provided to it.
51. The IS also has powers under section 124A of the Insolvency Act 1986 to petition for the winding up of a company in the public interest. In deciding whether to present such a petition it can use material obtained under:
 - sections 167, 168, 169 or 284 of FSMA;
 - regulations made as a result of section 262(2)(k) of FSMA where the company is an open-ended investment company (within the meaning of FSMA);
 - any information or documents obtained under section 165, 171, 172, 173 or 175 of FSMA.
52. Where, from information obtained following the exercise of its statutory powers of investigation, the FCA considers that the conduct of a person acting as a director (or a shadow director, or someone instructing an unfit director) of a limited company falls below the standard required, or it appears to the FCA that the management, operation or business of a limited company is such that it should be wound up in the public interest, it may refer information to the IS to consider whether to seek the disqualification of that person as a director or the winding-up of that company in the public interest.
53. The FCA may pass information to the IS in accordance with paragraph 52 above whether or not the person or company concerned is the subject of an investigation, and whether or not the person or company is carrying on a regulated activity under the provisions of FSMA.
54. Where the FCA provides information for this purpose, it will consult with the IS to ensure (as far as possible) that the information provided is sufficient to enable the IS decide whether to commence disqualification or winding-up proceedings as appropriate and contains sufficient evidential material to enable the proceedings to be taken forward.
55. Similarly, the IS may pass information to the FCA following a disqualification investigation or investigation under the Companies Act 1985 to assist the FCA in deciding whether an individual or firm should be authorised to carry on a regulated activity or whether some form of regulatory action or other legal proceedings (including civil or criminal) should be taken.
56. The types of information to be shared, the format and transmission of that information and subsequent support may be varied by written agreement between the organisations from time to time.
57. Information obtained under statutory powers of investigation can be used as evidence in enforcement proceedings commenced by the IS or FCA, and

where appropriate each organisation will take all reasonable steps, as necessary, to enable the information to be adduced in evidence.

Security and Compliance

58. Each organisation will be responsible for ensuring that appropriate data security controls are in place appropriate to the nature and sensitivity of the material and its source, and their respective protective markings. These will include:

- restricting access to the data to staff members on a 'need to know' only basis;
- carrying out duties in accordance with statutory powers and responsibilities;
- keeping information securely when not being accessed by these members of staff; and
- storing data on a system with security controls that ensure only access is by necessary and relevant people.

Handling breaches of security

59. All breaches of data security by one organisation must be reported to the other through the single point of contact referred to after paragraph 63 below immediately upon discovery by telephone and in writing within 24 hours of discovery.

60. Each party shall deal with any breach by it or its employees through its own internal procedures.

MISCELLANEOUS

Review of this MoU

61. The IS and the FCA will continue to monitor the functioning and effectiveness of this MoU and review it from time to time, as necessary.

Date of coming into force

62. This MoU will come into effect when signed by both organisations.

Publication

63. The IS and the FCA agree to publish this MoU on their respective websites.

Contacts

Contact at the IS: Keith Owen, Insolvency Service, Apex Court, City Link, Nottingham NG2 4LA. Tel: 0115 872 4710

Contact at the FCA: Mark Steward, Financial Conduct Authority, 25 The North Colonnade, Canary Wharf, London E14 5HS. Tel: 020 7066 1000.

Dated: 24 January 2018

Alec Pybus

Chief Operating Officer

Signed on behalf of the IS

Mark Steward

**Director Enforcement &
Market Oversight**

Signed on behalf of the FCA