

EXPLANATORY MEMORANDUM TO
THE FINANCIAL SERVICES AND MARKETS ACT 2000 (DISCLOSURE OF
CONFIDENTIAL INFORMATION) (AMENDMENT) REGULATIONS 2024

2024 No. 1306

1. Introduction

1.1 This explanatory memorandum has been prepared by HM Treasury and is laid before Parliament by Command of His Majesty.

2. Declaration

2.1 Tulip Siddiq MP, Economic Secretary to the Treasury and City Minister at HM Treasury confirms that this Explanatory Memorandum meets the required standard.

2.2 Emma Kavanagh, Deputy Director for Insurance and Pensions Markets Team at HM Treasury confirms that this Explanatory Memorandum meets the required standard.

3. Contact

3.1 Rohin Paul at HM Treasury Telephone: 07795 283959 or email: rohin.paul@hmtreasury.gov.uk can be contacted with any queries regarding the instrument.

Part One: Explanation, and context, of the Instrument

4. Overview of the Instrument

What does the legislation do?

4.1 These Regulations amend the Financial Services and Markets Act 2000 (Disclosure of Confidential Information) Regulations 2001 (S.I. 2001/2188) (“the Disclosure Regulations”), to rectify a drafting deficiency and widen to whom the Financial Conduct Authority (“FCA”) may disclose ‘confidential information’, as defined in section 348(2) of the Financial Services and Markets Act 2000 (“FSMA 2000”).

Where does the legislation extend to, and apply?

4.2 The extent of this instrument is the United Kingdom.

4.3 The territorial application of this instrument is the United Kingdom.

5. Policy Context

What is being done and why?

5.1 This instrument rectifies a drafting deficiency within the Disclosure Regulations and widens the information sharing gateways. This will help improve information sharing between the FCA and legal regulators and therefore improve the supervision of claims management activity. The FCA will be able to share information about potential claims management misconduct or emerging risks with the appropriate legal regulator, which will ultimately reduce consumer harm.

5.2 Under section 348 of FSMA 2000, the FCA is restricted from disclosing confidential information (meaning information which relates to the business or other affairs of any

person, and which was received by the FCA for the purposes of or in discharging its functions under this Act). Disclosure in contravention of this section constitutes an offence.

- 5.3 The Disclosure Regulations made under section 349 of FSMA set out a number of ‘gateways’ that permit the disclosure of confidential information by specified bodies for certain purposes. Whilst there are a number of existing gateways for the FCA to share confidential information, they limit what information can be disclosed.
- 5.4 As a result, there is a regulatory gap on firms conducting claims management activity. There have been numerous occasions where the FCA has held information in relation to claims management activity that would be of interest to a legal regulator. Examples include where the FCA has received a complaint about a legal professional conducting such activity and is unable to report directly to the appropriate regulator, or an FCA-regulated claims management company cancels its permissions looking to shift its work to a law firm where regulation under a legal regulator is considered more lenient. The FCA estimates that this occurs at least once per month. The existing restrictions on the disclosure of confidential information prevented action being taken against poor practice.
- 5.5 Widening the scope for the FCA to share confidential information with legal regulators will allow for more effective regulation and supervision of claims management activity, including such activity carried out by individuals based abroad and who provide claims management services to residents in Great Britain.
- 5.6 As a person is to be treated as carrying on claims management activities in Great Britain if the claimant is based in Great Britain, it follows that the regulatory regime may extend to firms and individuals located overseas. Therefore, one of the amendments to Schedule 2 is to include “the regulator of a foreign lawyer” that the FCA can disclose confidential information to.
- 5.7 This will enable the FCA to share confidential information concerning overseas firms and individuals providing claims management services in Great Britain, where those firms and individuals are exempt from FCA regulation.

What was the previous policy, how is this different?

- 5.8 The Financial Guidance and Claims Act 2018 (“FGCA”) transferred responsibility for claims management activity regulation from the Claims Management Regulator (a unit of the Ministry of Justice) to the FCA as of 1 April 2019. Claims management activity is carried out and regulated in one of the two following ways:
- by Claims Management Companies (“CMCs”) regulated by the FCA; or
 - by law firms and professionals regulated by the relevant legal regulator (for example, solicitors in England and Wales are regulated by the Solicitors Regulation Authority (with the Law Society as the approved regulator), whereas barristers are regulated by the Bar Standards Board (with the General Council of the Bar as the approved regulator).
- 5.9 Under the previous framework, various gateways for disclosure were open to the Claims Management Regulator under the Enterprise Act 2002, and to the FCA (to the Claims Management Regulator) under Schedule 2 of the Disclosure Regulations. Following the transfer of responsibility for claims management regulation to the FCA, provision for the FCA to share confidential information was made in the Disclosure Regulations by the Financial Services and Markets Act 2000 (Claims Management Activity) Order 2018/ 1253 (“the 2018 Regulations”). However, it only allowed the

FCA to disclose a narrow scope of information to legal regulators (concerning functions or arrangements under the FGCA).

6. Legislative and Legal Context

How has the law changed?

- 6.1 At present, confidential information relating to claims management activity can be disclosed under three types of gateway.
- The ‘self-help gateway’ in regulation 3 of the Disclosure Regulations enable the FCA to disclose information where doing so would allow the FCA to fulfil its public functions, referred to in section 349(1)(a) of FSMA 2000. Public functions include those granted by or in accordance with any provision contained in any enactment or subordinate legislation (section 349(5) of FSMA 2000).
 - Information concerning disciplinary proceedings relating to the exercise of a solicitor’s or barrister’s professional duties may be disclosed, as provided for in in section 349(5)(d) of FSMA 2000 and regulation 12(1)(b) of, and Schedule 3 to, the Disclosure Regulations.
 - A very narrow class of information may be disclosed to the Bar Council, the Law Society for England and Wales and the Chartered Institute of Legal Executives relating to fee cap rules for claims management activity under the FGCA, as provided for in regulation 12(1)(a) of, and Schedule 1 to the Disclosure Regulations.
- 6.2 This instrument amends the Disclosure Regulations by omitting the list of legal regulators in table 1 of Schedule 1, inserting a wider list of legal regulators in Schedule 2 together with widening the scope of the legal regulators’ functions. The instrument also inserts the definition of “foreign lawyer” in regulation 2 (interpretation).

Why was this approach taken to change the law?

- 6.3 The reason for these amendments is as follows.
- 6.4 The amendments to the Disclosure Regulations by the 2018 Regulations did not allow for effective information sharing between the FCA and the legal regulators. This instrument is therefore needed to amend the Disclosure Regulations in the way described above and to widen the information sharing gateways.
- 6.5 The following explains the reason to relocate the list of regulators from Schedule 1 to Schedule 2. One of the main purposes of the Disclosure Regulations when they were made was to ensure the UK complied with professional secrecy requirements imposed by EU Regulations and directives when certain information was disclosed. Part III of the Disclosure Regulations makes provision for the disclosure of information which is subject to restrictions on disclosure in EU instruments relating to financial services. The regulations in that Part provide that such information may be disclosed to or by the persons listed in Schedule 1 for purpose of discharging the functions listed beside them. Part IV of, and Schedule 2 to, the Disclosure Regulations deals with disclosure for purely domestic UK purposes.

Therefore, the list of legal regulators inserted in Schedule 1 by the 2018 Regulations should have been inserted in Schedule 2 because this concerns an entirely domestic regime. This instrument corrects that drafting deficiency, whilst taking the

opportunity to add to the list of legal regulators to which disclosure can be made and widening the list of their functions.

7. Consultation

Summary of consultation outcome and methodology

- 7.1 A formal consultation process has not been undertaken given the limited impact of this instrument.
- 7.2 The Government has engaged with the FCA on a regular basis following the FCA's request to make this change to legislation. Additionally, the Government has engaged with UK legal regulators to inform them of this instrument but, given it would not be practical to do so, has not engaged with the regulators of foreign lawyers.
- 7.3 Under Article 36(4) of the UK GDPR, the Government is required to consult the Information Commissioner's Office (ICO) on any proposals for legislative or statutory measures they are developing which involve the processing of personal data. The Government duly consulted the ICO on the development of this instrument.

8. Applicable Guidance

- 8.1 No guidance is issued with these Regulations.

Part Two: Impact and the Better Regulation Framework

9. Impact Assessment

- 9.1 The changes as a result of this SI are technical in nature and address a current gap in the FCA's power to share confidential information with other legal regulators.
- 9.2 An Impact Assessment has not been prepared for this instrument because it is not expected that there will be any impact on businesses.

Impact on businesses, charities, and voluntary bodies

- 9.3 This legislation is relevant for the FCA and the changes to be implemented under this instrument are technical in nature and do not impact the status quo as to how insurance firms operate.
- 9.4 There is no, or no significant, impact on business, charities, or voluntary bodies because the amendments to the Disclosure Regulations under this legislation do not impose additional requirements or administrative burdens.
- 9.5 The legislation does not impact small or micro businesses.
- 9.6 There is no, or no significant, impact on the public sector because the amendments to the Disclosure Regulations and the additional requirements imposed are not burdensome for the FCA when conducting its activity.

10. Monitoring and review

What is the approach to monitoring and reviewing this legislation?

- 10.1 At least once a year the FCA must make a report to HM Treasury on the discharge of its functions. The FCA must also maintain a complaints mechanism for the investigation of complaints arising in connection with the exercise of, or failure to exercise, any of its relevant functions.

- 10.2 The instrument does not include a statutory review clause, and, in line with the requirements of the Small Business, Enterprise and Employment Act 2015, the Economic Secretary to the Treasury, Tulip Siddiq, has made the following statement:
- “It is not proportionate to include a review clause in this instrument because the estimated annual net direct cost to business is less than £5 million and there are no factors present which make it particularly desirable to include a review clause”.

Part Three: Statements and Matters of Particular Interest to Parliament

11. Matters of special interest to Parliament

- 11.1 None

12. European Convention on Human Rights

- 12.1 As the instrument is subject to negative resolution procedure and does not amend primary legislation, no statement is required.

13. The Relevant European Union Acts

- 13.1 This instrument is not made under the European Union (Withdrawal) Act 2018, the European Union (Future Relationship) Act 2020 or the Retained EU Law (Revocation and Reform) Act 2023 (“relevant European Union Acts”).