

Unsolicited visits and surprise  
requests for information by the  
Financial Services Authority

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SLAUGHTER AND MAY

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# 1. Introduction

Officials from the Financial Services Authority (FSA) may telephone or contact you or may visit your offices unexpectedly to investigate possible breaches of financial services legislation or FSA rules. The law entitles the FSA to do this and obliges all authorised firms to co-operate. This obligation also extends to firms which act as the appointed representatives of authorised firms and to individuals who are FSA approved persons.

This briefing provides an overview of the FSA's investigatory powers and the position as regards the confidentiality of information disclosed to the FSA, as well as practical guidance on document preservation and a "first aid" kit of some "dos" and "don'ts" when handling an unsolicited visit or surprise request for information from the FSA.

If you have any questions, please contact a member of the Financial Regulatory Investigations Group, whose details can be found at the end of this document.

## 2. The FSA's investigatory powers

### BACKGROUND: THE FSA'S POWERS

The Financial Services and Markets Act 2000 (as amended) (**FSMA**) grants the FSA various powers to gather information, appoint investigators and require the production of a report by a suitably skilled person in relation to an FSA authorised firm or persons connected with it, including appointed representatives and individual approved persons.

The actions which can be taken by the FSA under these powers are largely similar in both criminal and civil investigations and include information gathering through the use of one or more of the following:

- "cold calling" employees to ask questions and conduct mini-interviews;
- other voluntary or compulsory interviews, in some cases carried out under caution;
- letters or notices requiring disclosure of specific information and documentation in relation to an FSA regulated matter or, in some cases, an overseas regulatory investigation; and
- unannounced visits to a firm's premises to gather documentary evidence and/or to conduct interviews with staff.

The FSA has issued guidance on its powers of enforcement and investigation in which it is advised that the FSA will always adopt what it believes to be the most effective means of gathering information and will use whatever powers it deems appropriate to perform its statutory function to investigate any alleged misconduct.

Generally, under the FSA's Principles for Businesses firms authorised by the FSA are required to deal with the FSA in "an open and cooperative way and ... [to] disclose to the FSA appropriately anything relating to the firm of which the FSA would reasonably expect notice." It is important to note that disclosure requirements imposed, or investigatory powers exercised, by the FSA may be justified on the basis of this principle even if such requirements or powers are not expressly contemplated in FSA rules and guidance published from time to time.

### INITIATION OF AN INVESTIGATION BY FSA

Where the FSA has appointed one or more persons to conduct an investigation on its behalf, the FSA is generally required to give written notice of the relevant appointments and the reasons for the appointments (which are usually expressed in broad language) to the person under investigation (the **Notice of Appointment**). A Notice of Appointment may not be issued if the FSA believes that an investigation may be frustrated if the person being investigated is informed of that fact prior to the commencement of the investigation. Where a Notice of Appointment has been issued, an initial meeting will generally be scheduled between the FSA and the firm to provide further details as to the scope of the investigation and the nature of the FSA's concerns.

In some instances, however, the FSA will make use of its powers to make unsolicited calls to employees or to make unannounced visits to firms, without in advance providing copies of any Notice of Appointment to the employee or the firm.

#### "Cold calling" by the FSA

Under its powers of investigation, the FSA may "cold call" employees to ascertain whether there may have been any regulatory breaches of a civil or criminal nature. The FSA has, for example, indicated an intention to use this power in market abuse investigations. In such cases, it is in our view

reasonable for persons receiving such a call to take the caller's contact details and to indicate that they will return the call shortly. This is justifiable as it allows the employee to:

- gather thoughts about matters to be discussed in the call;
- collect any relevant paperwork;
- speak to the firm's internal legal team; and
- ensure that the caller is from the FSA and not a rival firm calling to achieve a strategic aim.

If the person under investigation follows the steps listed above, they should ensure that the FSA is called back promptly, in most cases within a few hours of the initial call being received.

Where an employee is not given time to (i) gather thoughts and relevant papers, and (ii) speak to his legal advisers, there is some doubt as to whether any weight can be given to any evidence which the FSA obtains by such an unsolicited phone call. In particular, if the person called by the FSA is suspected of a criminal offence (such as insider dealing) or of having committed market abuse, he ought only to be interviewed under caution. It seems to us to be reasonable for such a person to be permitted time to speak with a legal adviser before agreeing to submit to a telephone interview by the FSA.

### **Unannounced visits**

It is also possible that the FSA may carry out an unannounced visit to a firm's premises during business hours to search for any evidence of a regulatory breach, although the FSA normally expects to be able to give reasonable notice to a firm when it seeks access to business premises. The FSA is not obliged to give or state grounds for the required access prior to obtaining such access, although it may do so in practice so that meetings are more productive.

On being received by the firm under investigation, the inspection team leader should present (or be asked to present if necessary) (i) their identity documents (which should be checked and copied) and (ii) if issued, a copy of the Notice of Appointment (which should be checked and copied).

The firm's in-house counsel should generally attend as soon as possible. External lawyers should also be instructed to help co-ordinate the firm's response to the investigation and ensure that the company's interests are protected during the inspection. The focus of the FSA's efforts during any unannounced visit is likely to be on seizing documents – the fact that any visit is taking place on an unannounced visit is generally indicative of the fact that the FSA is concerned that documents might be destroyed in the event the firm being visited (or its employees) were to be given advance warning of the visit. Nevertheless, the FSA is also likely to want to ask questions during any such visit, including (in some instances) by way of formal taped interview.

During any unannounced visit, the FSA and its appointed investigators have the power to request a meeting with any person or request documents to obtain information which they require for the purposes of the investigation. FSA investigators also have a general power to require any person to give all assistance in connection with the investigation which the person is reasonably able to give, such as providing oral explanations of illegible handwriting, technical terms or obscure references in documentation.

Where the FSA carries out an interview, the interviewee has the right to be accompanied by a legal adviser. The FSA should explain whether the interview is being conducted on a voluntary or compulsory basis and therefore what use can be made of the answers that are given by the

interviewee. Where the interview is recorded (which it generally should be), the interviewee should in due course be given a copy of the recording or transcript. The FSA is required to conduct any interview of someone who is suspected of having committed a criminal or market abuse offence under caution. This means that any answers given by the suspect can be used by the FSA in any future prosecution. Equally, should the interviewee decline to answer questions in an “under caution” interview, the FSA will be able to refer to that refusal in any subsequent prosecution. It is imperative that anyone asked to submit to an interview under caution during an unannounced visit by the FSA should, before agreeing to be interviewed, seek legal advice as to his or her position.

Where an interview is carried out following a request from an overseas regulator, the investigators may allow a representative of that overseas regulator to attend the interview.

Ideally, during an unannounced visit, the firm should arrange for investigators to be assisted or shadowed by a firm representative. This person should ensure that a record is kept of all documents copied by the investigators. Under no circumstances should anyone destroy or attempt to destroy any documents, whether paper or electronic.

Firm representatives must be careful to ensure that they do not give misleading, inaccurate, or otherwise false responses to questions which the investigators ask. If firm representatives are unsure of the answer to a question, then this should be explained along with the reasons why.

Firm representatives should avoid the temptation to “chat” or volunteer unsolicited information during the inspection.

The investigators may produce their own written note of questions asked and answers, and ask a representative of the firm to sign it and confirm that it is an accurate record. It will generally be advisable for the representative to discuss such a note with legal advisers before signing it.

## **PRIVILEGED DOCUMENTS**

The FSA is prevented by FSMA from requiring the production, disclosure or inspection of documents protected by legal privilege. Legal privilege extends to such documents as most communications between a legal adviser and his client as well as communications between a client and his lawyer or between either or them and a third party made for the purpose of actual or prospective legal proceedings. However, it is important to note that legal privilege can be waived, in many cases inadvertently.

If it is believed that, or if it is uncertain whether, legal privilege extends to particular documents (or whether legal privilege has been waived), you should assert privilege and seek external legal advice. Documents which you consider to be legally privileged documents should be grouped together in a clearly marked pile or folder (electronic and/or paper) and any request by FSA officials to inspect the documents should be refused. If a dispute remains, it will be necessary for your legal advisers to seek to agree with the FSA a means of resolving the dispute as to the status of the documents. This might involve the inspection of the documents by an independent lawyer.

### 3. Confidentiality of information disclosed to the FSA

FSMA and the Financial Services and Markets Act 2000 (Disclosure of Confidential Information) Regulations 2001 (the **Regulations**) impose certain confidentiality restrictions on the FSA when carrying out its regulatory function of information gathering.

Broadly, these restrictions make any unauthorised disclosure of information gathered by the FSA as part of an investigation a criminal offence. There are, however, a number of circumstances in which this general rule either does not apply, or is relaxed to permit disclosure to be made to certain persons for certain purposes. These are as follows:

- where consent is received from the person to whom the information relates and from the person from whom the information was obtained;
- where the information is publicly available;
- where the information is in the form of a summary or collection of information so framed that it is not possible to ascertain from it information which relates to any particular person; or
- where otherwise prescribed by the Regulations (described as “gateways”).

The “gateways” effectively set out exceptions from the general rule which allow the FSA to divulge information they have received as part of a FSMA investigation to other public bodies (such as HM Treasury, the Bank of England or the UK competition authorities) to enable the FSA or the body to which the information is divulged to discharge its public functions.

The gateways also provide a means for information sharing between the FSA and overseas regulators where the relevant regulators have entered into a cooperation agreement with the FSA. In addition, an “equivalence” condition must be met, which means that the information, when received by the overseas regulator, must be subject to guarantees of secrecy at least equivalent to those set out in FSMA, the Regulations and the EU single market directives.

Except in exceptional circumstances, the FSA does not normally announce that it is conducting an investigation into a particular firm or individual. Firms and individuals may be concerned about to whom they can disclose the fact that the FSA is investigating them. The FSA’s expectation is that the subject of an investigation will treat the fact that an investigation is taking place, and the subject matter of that investigation, confidential. However, the FSA has stated explicitly that this does not prevent a person under investigation from seeking professional advice, making their own enquiries into the matter, providing appropriate details of the matter to their auditors or making notifications required by law or under the terms of contracts.

## 4. Document preservation guidelines

If you work in or for an FSA authorised firm or an appointed representative of such a firm, it is important to observe the following document preservation guidelines in connection with FSA enquiries. Failure to do so could result in severe sanctions against your firm and/or you personally. It would be advisable to ensure that all individuals who are FSA approved persons in your business receive a copy of this guidance and comply with it.

### WHAT SHOULD I PRESERVE DURING FSA ENQUIRIES?

Once you become aware of an FSA enquiry or investigation, you should ensure that any documents which may be relevant to that enquiry or investigation are preserved. If you are unsure about whether a particular document may be relevant, preserve it. "Document" means, in this context, any medium in which information is recorded (whether hard copy or electronic) and includes any kind of communications (e.g. letters, emails, faxes), reports, presentations, draft documents, working notes, meeting notes, agendas, telephone tapes and records, accounting records and diaries. You should consider not only documents you hold in your place of work, but also any relevant documents you may hold at home, in archives or with an assistant or secretary. In addition to the importance of not destroying any relevant documents, it is critical that you take whatever steps are necessary to prevent the destruction of relevant documents in the normal course of business; in particular you should consider whether it is necessary to suspend any automatic document destruction processes.

### WHAT SHOULD I DO WITH THE DOCUMENTS?

You should keep relevant documents in the same way as you would file and manage them in the normal course of business. The key is to ensure that documents are preserved; you should not, however, rearrange, move or alter any documents unless absolutely necessary to ensure their preservation. Once you have taken the necessary steps to preserve documents, speak with your legal department as to next steps.

### WHAT ABOUT DOCUMENTS CREATED OR UPDATED AFTER AN FSA ENQUIRY?

Any documents that you create (including by updating an existing document) which are relevant to the FSA's enquiries or investigation may need to be provided to the FSA unless legally privileged. The fact that you created the document after the FSA began its investigation is irrelevant. You should therefore consider carefully, and consult your legal department, before creating any such documents. In particular, you should not create any documents (whether correspondence with third parties or internal reports or memoranda) commenting on, or setting out views about, the issues being investigated by the FSA.



## 5. A “first aid” kit

### DO

- ✓ Seek legal advice internally or externally as soon as possible.
- ✓ Refer visitors claiming to be on FSA business to your legal department. You are entitled to a short delay to take legal advice before allowing an inspection to proceed. You should not be regarded as obstructing the officials if you call the company’s in-house or external lawyers for advice and assistance. Give your lawyers clear instructions of where you are and your telephone contact details so that they can reach you.
- ✓ On receipt of a “cold call” purporting to be from the FSA, ask for the caller’s contact details and explain you will call them back promptly after you have taken legal advice and gathered relevant papers and thoughts. You should then speak with your in-house legal team before returning the call.
- ✓ Be aware that anything you say to FSA officials may be used against the firm and, possibly, you.
- ✓ When receiving an FSA visit, identify which of the officials is the team leader. Ask to see, and check carefully, any notice of appointment providing the basis for the investigation. If an investigation has been commenced, the notice of appointment should state the purpose and scope of the investigation. Find out as precisely as you can what it is the officials are looking for and whether the FSA is seeking to compel disclosure of information or is seeking voluntary assistance with its enquiries.
- ✓ If asked, secure documents or equipment while visiting FSA officials wait to proceed with their inspection.
- ✓ Check and copy the identity documents of visiting FSA officials.
- ✓ Try to arrange for each official to be assisted/shadowed by a member of staff and, if possible, also a lawyer.
- ✓ Keep as full a record as you can of what the officials ask for and inspect, of questions asked and answered, and of any other discussions.
- ✓ During any unannounced visit by the FSA, answer any requests from the FSA for short explanations of documents, the whereabouts of documents, people’s roles etc. truthfully, fully and promptly. Adopt the same approach in the event of a “cold call” from the FSA.
- ✓ If FSA officials wish to interview anyone during a visit, they should make clear whether this is on a compulsory or voluntary basis. If the latter, you should seek legal advice before agreeing to be interviewed. If the FSA suspects you of having committed a criminal offence, they should conduct any interview under caution and you should take legal advice as to whether you should exercise your “right” to silence.
- ✓ Assert legal privilege in any documents which you consider to be privileged and which the FSA is therefore not entitled to inspect. If there is a dispute about this, you should seek to agree with the FSA to have the relevant documents put to one side and seek immediate legal advice.
- ✓ Take your own copy of all documents copied by FSA officials (including CD-ROMs) and of their document inventory.
- ✓ Seek immediate legal advice if at any stage you are uncertain as to your rights and responsibilities.
- ✓ Remain calm and courteous throughout any visit that you receive from FSA officials.

## DON'T

- ✘ Refuse admission or keep the officials waiting unduly.
- ✘ On receipt of a “cold call” purporting to be from the FSA, answer their questions or enter into any discussion prior to taking advice from your in-house legal team and gathering relevant papers and thoughts.
- ✘ Forget or refuse to return, or wait more than a few hours before returning, a “cold call” received from the FSA.
- ✘ Tell any person outside the company (except the company’s external lawyers) what is happening.
- ✘ Delay in seeking to contact any executive (however senior or wherever they may be) the officials ask to see.
- ✘ Destroy or delete any records, paper or electronic.
- ✘ Appear unhelpful or obstruct the investigation.
- ✘ Sign anything at the officials’ request without legal advice.

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**IMPORTANT NOTE:** *This paper is not intended to provide legal advice, which should be sought on particular matters. If you want to know more, or have specific questions, please contact your usual adviser at Slaughter and May, or a member of the Financial Regulatory Investigations Group detailed below.*

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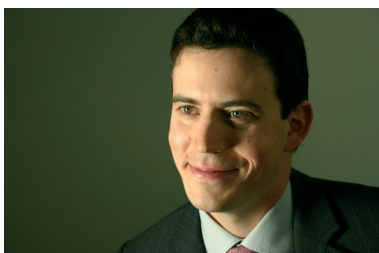
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