

Freedom of Information Act 2000 (FOIA) Decision notice

Date: 25 March 2022

Public Authority: Financial Conduct Authority
Address: 12 Endeavour Square
London
E20 1JN

Decision (including any steps ordered)

1. The complainant has requested information relating to financial penalties imposed by the Financial Conduct Authority on Prudential Insurance Company (Prudential) and Standard Life Assurance Ltd (Standard Life).
2. The Commissioner's decision is that the Financial Conduct Authority (FCA) has correctly cited section 44(1)(a) in response to the request.
3. The Commissioner does not require the public authority to take any steps as a result of this decision notice.

Request and response

4. On 21 June 2021, the complainant wrote to the FCA and requested information in the following terms:

"On 30 September 2019 the FCA imposed a financial penalty of £23,875,000 pursuant to section 206 of the Financial Services and Markets Act 2000 on the Prudential Insurance Company ("Prudential") for breaches of Principle 3 (Management and Control) and Principle 6 (Customers' Interests) of the Authority's Principles for Business that occurred between 1 July 2008 and 30 September 2017.

Paragraph 2.5 of the Final Notice provides that the Prudential has voluntarily agreed to conduct a past business review of non-advised annuity sales in order to identify customer detriment and pay proper redress to customers who are likely to have suffered loss as a result of the Prudential's failure to comply with regulatory requirements.

Paragraph 2.13 of the Final Notice provides that many of the Prudential's customers could have obtained a higher income in retirement by shopping around for an annuity, or an enhanced annuity, on the open market.

Please let us know in approximate terms:

- 1. how many customers of the Prudential are entitled to redress to put them in the position they would have been in had they bought an enhanced annuity on the open market with a higher rate than the annuity they in fact purchased; and*
- 2. how many customers of the Prudential have received such redress as at today's date; and*
- 3. what sums have been paid to those customers as at today's date; and*
- 4. how many customers of the Prudential are entitled to redress to put them in the position they would have been in had they bought an annuity (rather than an enhanced annuity) on the open market with a higher rate than the annuity they in fact had purchased; and*
- 5. how many customers have received such redress as at today's date; and*
- 6. how much has been paid to those customers as at today's date.*

Request 2

By a Final Notice dated 23 July 2019 the FCA imposed on Standard Life Assurance Ltd ("Standard Life") a financial penalty of £30,792,500 for breaches of Principle 3 (Management and Control) and Principle 6 (Customers' Interests) of the Authority's Principles for Business (the "Principles") that occurred between 1 July 2008 and 31 May 2016.

Paragraph 2.4 of the Final Notice provides that Standard Life has voluntarily agreed to conduct a past business review of the non-advised annuity sales in order to provide proper redress in a timely manner to customers who were likely to have suffered loss as result of Standard Life's non-compliance.

Paragraph 2.7 provides that firms are required to explain to the customer that they may get a better annuity rate if they shop around on the open market.

- 7. how many customers of Standard Life are entitled to redress to put them in the position they would have been in had they bought an*

enhanced annuity on the open market with a higher rate than the annuity they in fact purchased; and

8. how many customers of Standard Life have received such redress as at today's date; and

9. what sums have been paid to those customers as at today's date; and

10. how many customers of Standard Life are entitled to redress to put them in the position they would have been in had they bought an annuity (rather than an enhanced annuity) on the open market with a higher rate than the annuity they in fact had purchased; and

11. how many customers of Standard Life have received such redress as at today's date; and

12. how much has been paid to those customers as at today's date."

5. The FCA responded on 20 July 2021 and refused to provide the requested information. It stated that it held some information within the scope of both parts of the request. However, it explained that it was prohibited from disclosing it under the Financial Services and Marketing Act 2000 (FSMA).
6. Following an internal review the FCA wrote to the complainant on 20 August 2021 and maintained it had correctly applied the provisions of section 44(1)(a) FOIA.

Background

7. In 2016 the FCA published the results of a thematic review of annuity sales practices - <https://www.fca.org.uk/publications/thematic-reviews/review-annuity-sales-practices>. The review assessed how firms provided information to customers, on a non-advised basis, about shopping around for enhanced annuities. Following the thematic review the FCA asked a small number of firms to conduct a review of their past sales to identify customers who were likely to be eligible for redress and to compensate them accordingly.
8. The Financial Services and Markets Act 2000 ("FSMA") is concerned with the regulation of financial services and markets in the UK. Under FSMA, the FCA has the functions (among others) of monitoring a firm's and key individuals' compliance with the FCA's requirements and is provided with powers to investigate matters in relation to the exercise of its functions and, if appropriate, taking regulatory action.

9. If the FCA commences an investigation, this means that the FCA considers that there are circumstances that suggest that a breach of its rules or principles may have occurred. Following the conclusion of regulatory action the FCA will consider the circumstances of each case, but will ordinarily publicise enforcement action where this has led to the issue of a Decision Notice or Final Notice (see chapter 6 of the Enforcement Guide, link here:

<https://www.handbook.fca.org.uk/handbook/EG/6/2.html>).

10. In this case, following further work undertaken by the FCA's Enforcement and Market Oversight Department Final Notices issued to Standard Life Assurance Limited ("Standard Life") and Prudential Assurance Company Limited ("Prudential") were published on the FCA website as follows:

<https://www.fca.org.uk/publication/final-notices/standard-life-assurance-limited-2019.pdf>

<https://www.fca.org.uk/publication/final-notices/prudential-assurance-company-limited-2019.pdf>

Scope of the case

11. The complainant contacted the Commissioner on 23 August 2021 to complain about the way his request for information had been handled and stated:

"The FCA has refused to provide the information on the grounds that it is confidential for the purposes of FSMA s348, on the basis that if it was disclosed it would identify the entities named in our request for information. As is obvious, the identity of those entities is already known to us, and to the public, as they were named (publicly) in the FCA Notices. As such, the information sought cannot be confidential information as it is either (i) already known to the public, or is (ii) information that would not disclose the identity of any particular person."

12. The Commissioner considers the scope of his investigation to be to determine if the FCA has correctly applied section 44(1)(a) to the withheld information.

Reasons for decision

Section 44(1)(a) – (Prohibitions on disclosure)

13. Section 44(1)(a) of the FOIA states that information will be exempt from disclosure under the FOIA if its disclosure would otherwise be prohibited by another piece of legislation.
14. During the course of his investigation the Commissioner wrote to FCA stating:

"The operation of the statutory bar is dependent on the consideration of the following issues; firstly, whether the FCA can be classified as a primary recipient, secondly, whether the request is for 'confidential information' and if so, thirdly, whether there is consent to the release of the information or whether this could be obtained.

The first matter to determine is if FCA is a primary recipient. Primary recipients are defined at section 348(5) of the FSMA and include the FCA. It is therefore accepted that the FCA is a primary recipient for the purposes of the FSMA.

Secondly, the Commissioner needs to determine if the information is confidential.

Section 348(2) of FSMA defines "confidential information" as information which

(a) relates to the business or other affairs of any person;

(b) was received by the primary recipient for the purposes of, or in the discharge of, any functions of the Authority; and

(c) is not prevented from being confidential information by subsection 348(4).

Subsection (4) states that the information cannot be confidential information if it has already been disclosed to the public or it can be anonymised in such a way that it is not possible to ascertain from it information relating to a particular person.

Clearly the first criterion has been met as it relates to the business or other affairs of any person.

The second criterion is also met as the information was received by the FCA for the purposes of, or in the discharge of, its functions under FSMA, that is, the purpose of carrying out its supervision of the firms named in the request.

It is the third criterion that remains in dispute. FCA does not consider subsection (4) is applicable because the information requested is not in the public domain, and it would be unable to anonymise any information.

As the complainant has indicated, Final Notices have been published on the FCA website relating to the requested information. [Final notice 2019: Standard Life Assurance Limited \(fca.org.uk\)](#)

I refer, for example, to paragraph 2.4(1):

*"The Authority has taken into account, and given credit for, the following: (1) On 31 January 2017, Standard Life voluntarily agreed to conduct a past business review of non-advised annuity sales in order to provide proper redress in a timely manner to customers who are likely to have suffered loss as a result of Standard Life's non-compliance with a requirement. Standard Life is currently reviewing approximately 81,000 sales of non-advised annuities, where customers may have been entitled to an enhanced annuity. As at 31 May 2019 Standard Life had paid approximately **£25.3 million to 15,302 customers**. Based on the redress payments made to customers as a result of Standard Life's redress exercise to date, the estimated total redress payable for the entire customer population will amount to approximately **£61.2 million...."***

And [Final notice 2019: The Prudential Assurance Company Limited \(fca.org.uk\)](#)

*2.5(1) "The Authority has taken into account, and given credit for, the following: (1) On 2 February 2017, Prudential voluntarily agreed to conduct a past business review of non-advised annuity sales in order to identify customer detriment and pay proper redress to customers who are likely to have suffered loss as a result of Prudential's failure to comply with regulatory requirements. Prudential is currently reviewing approximately 183,000 sales of non-advised annuities, where customers may have been entitled to an enhanced annuity. As at 19 September 2019, Prudential had offered **approximately £110 million** in redress (i.e. including ongoing annuity uplifts) to approximately **17,240 customers**.*

As the above information is in the public domain, the question to be resolved is why up-to-date information is considered to be 'confidential' whereas the above information was not."

15. In its submission to the Commissioner the FCA stated that it holds information in respect of questions 1,2,3,7,8 and 9 as of September 2020, when the past business review project closed.

1. how many customers of the Prudential are entitled to redress to put them in the position they would have been in had they bought an enhanced annuity on the open market with a higher rate than the annuity they in fact purchased; and
2. how many customers of the Prudential have received such redress as at today's date; and
3. what sums have been paid to those customers as at today's date; and
7. how many customers of Standard Life are entitled to redress to put them in the position they would have been in had they bought an enhanced annuity on the open market with a higher rate than the annuity they in fact purchased; and
8. how many customers of Standard Life have received such redress as at today's date; and
9. what sums have been paid to those customers as at today's date;
16. However, it does not hold more recent information as at the date of the original request under FOIA i.e. 21 June 2021. In addition, the FCA does not hold information for questions 4, 5, 6, 10, 11 and 12 as this did not form part of the review of past business the two firms undertook.
17. In respect of questions 3 and 9 it stated it should also be appreciated that the redress figures in the Final Notices referred to both actual back payments made as well as reserves for future top ups, which were based on various assumptions (e.g. longevity, interest rates etc).
18. In respect of questions 1 and 7 the complainant asked how many customers of Standard Life/Prudential are entitled to redress. FCA explained that in some cases customers from within the in-scope population may have not responded to the firms' communications about the review being undertaken. The firms will have, however, made at least three attempts to contact these customers. Therefore, final figures are not held for these parts of the request.
19. Turning to the issue highlighted in the Commissioner's correspondence detailed above, FCA explained that there are a number of statutory provisions in FSMA which give it a discretion to either (i) disclose confidential information to specified bodies for specified purposes or (ii) in some cases, publish information which, until that point, is confidential information but ceases to be because of the effect of subsection 348(4).
20. In the former category, section 349(1) FSMA provides that:

"Section 348 does not prevent a disclosure of confidential information

which is– (a) made for the purpose of facilitating the carrying out of a public function; and (b) permitted by regulations made by the Treasury under this section.

21. The regulations made under section 349(1)(b) FSMA are the FSMA (Disclosure of Confidential Information) Regulations 2001 (SI 2001/2188). Those regulations provide the FCA with a discretionary power to disclose to certain bodies for certain purposes.
22. Following a decision of the Upper Tribunal, the Commissioner states in the guidance on section 44 FOIA, at paragraph 35, that
"Where a public authority has discretion about applying a gateway to disclosure, the Commissioner will not question or examine the reasonableness of the authority's decision."
23. In terms of the latter, section 391 FSMA provides, so far as relevant, as follows:
 - (4) The regulator giving a decision or final notice must publish such information about the matter to which the notice relates as it considers appropriate.
 - ...
 - (6) The FCA may not publish information under this section if, in its opinion, publication of the information would be—
 - (a) unfair to the person with respect to whom the action was taken (or was proposed to be taken),
 - (b) prejudicial to the interests of consumers, or
 - (c) detrimental to the stability of the UK financial system.
 - (7) Information is to be published under this section in such manner as the regulator considers appropriate.
24. Therefore section 391(4) requires the FCA to publish such information, including confidential information, as it considers appropriate about the matter to which the notice relates "when giving a final notice".
25. So, when the FCA gives a final notice it can publish what was, until that point, "confidential information" under section 348(2) FSMA. In other words section 391(4) is a provision, in accordance with section 348(4) FSMA, which allows what would otherwise be confidential information to be "made available to the public by virtue of being disclosed in any circumstances in which, or for any purposes for which, disclosure is not precluded by this section".

26. However, there is no provision which deals with the publication of section 348 "confidential information" after that date i.e. no provision to "update" information contained in the Notice and in particular which would permit the disclosure of "confidential information".
27. For that the FCA would either need to consider obtaining any relevant consents, in accordance with section 348(1) FSMA, or need to consider any available gateways in the FSMA (Disclosure of Confidential information) Regulations 2001 and the exercise of its discretion under those Regulations.
28. For this reason, FCA was able to publish the information contained within the Final Notices but is precluded from disclosing similar information which it received at a later date i.e., as at September 2020 when the review of past business project closed.

Section 44(1)(a)

29. Turning to the application of section 44, as previously mentioned FSMA is concerned with the regulation of financial services and markets in the UK. Section 348 of FSMA restricts the FCA from disclosing "confidential information" it has received in carrying out its regulatory functions, except in certain limited circumstances.
30. Confidential information for these purposes is defined as non-public and non-anonymised 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 the discharge of, any of its functions under FSMA, where consent to disclosure has not been given to the FCA. Disclosure of any such confidential information, without the consent of the provider of the information and, if different, the person to whom it relates, is in breach of section 348 of FSMA and is a criminal offence.
31. In this case, some of the information requested would have been received by the FCA as part of the arrangements it has in place for carrying out its supervisory function under section 1L of FSMA. It therefore relates to confidential information it would have received from a third party, and where this relates to its or another party's business or other affairs.
32. FCA explained that the confidentiality regime in FSMA, which triggers the exemption in section 44 of the FOIA, 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 FSMA are met, the restriction on disclosure applies. Section 348(1) of FSMA states that confidential information must not be disclosed by the FCA (so far as relevant to this case) without the consent of the person from whom the FCA obtained the information and, if different, the person to whom it relates.

33. FCA referred to the Information Tribunal case of 'Norman Slann and The Information Commissioner and Financial Services Authority' (EA/2005/0019) where the Tribunal accepted that, if FCA do not have consent, the FOIA's regime cannot make it seek it.
34. It further stated that in its internal review response letter it explained that its experience with third parties about the FCA disclosing information obtained from them or about them, in response to information requests under the FOIA, is overwhelmingly that they are opposed to any disclosure.
35. This is given the importance those operating in the financial services sector attach to the information they provide the FCA; and the wider consequences that any damaging disclosures might have on the financial markets more generally. There is no reason to consider that the providers of the underlying information would react differently to the present request.
36. Therefore, in terms of consent, FCA confirmed that it does not hold consent to the disclosure of the requested confidential information that is restricted from disclosure under section 348 of FSMA.
37. Section 348(2) of FSMA defines "confidential information" as information which (a) relates to the business or other affairs of any person; (b) was received by (so far as relevant to this case) the FCA for the purposes of, or in the discharge of, any functions of the FCA; and (c) is not prevented from being confidential by virtue of section 348(4).
38. FCA explained that for the purposes of section 348 FSMA it does not matter if it requested information, for instance, from the firms or individuals named, or whether they provided it pro-actively. Either way it will be information "received" under section 348.
39. In other cases, before the Court of Appeal and the Information 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.
40. Consequently, the FCA is prohibited from disclosing to the complainant, and the public at large, any information which it received while performing its regulatory duties and which is not in the public domain or where the relevant consents to disclosure have not been obtained.
41. In addition FCA explained that section 348(4) FSMA 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.

42. FCA consider that sub-section (4)(a) is not a relevant consideration in this case because (a) the specific information requested is not publicly available; and (b) it would be impossible for it to make the information anonymous, as it is clearly identifiable as relating to the subject matters named in the request. Therefore, provided the criteria for information being "confidential" set out in section 348 FSMA are met, which in this case FCA consider they are, there is a statutory bar from the FCA disclosing confidential information it has received from a third party, and where this relates to its or another party's business or other affairs, unless consent to disclosure has been provided.
43. As such, FCA are satisfied that it has correctly applied section 44(1)(a) of the Act to the information requested, where this meets the criteria in section 348 FSMA.

The Commissioner's decision

44. As referred to in paragraph 14 above, it is clear the requested information relates to the business or other affairs of any person. It is also clear the information was received by the FCA for the purposes of, or in the discharge of, its functions under FSMA, that is, the purpose of carrying out its supervision of the firms named in the request.
45. Section 348(4) of the FSMA states that:
 - (4) Information is not confidential information if—
 - (a) it has been made available to the public by virtue of being disclosed in any circumstances in which, or for any purposes for which, disclosure is not precluded by this section; or
 - (b) it is in the form of a summary or collection of information so framed that it is not possible to ascertain from it information relating to any particular person.
46. The Commissioner has considered FCA's reasoning on why the information remains confidential and concurs. The information held in question was obtained after the final notices had been published and therefore had not previously been made public.
47. The final notices were made public at the discretion of the FCA, and it is not for the Commissioner to question that discretion, nor contradict that position.
48. As there is no provision which deals with the publication of "confidential information" provided after the final notice i.e. no provision to "update"

information contained in the Notice and in particular which would permit the disclosure of "confidential information", the Commissioner finds the FCA has correctly cited section 44(1)(a) FOIA in response to the request.

49. As section 44 is an absolute exemption there is no need to consider whether the public interest.

Other matters

50. The Commissioner would like to acknowledge the quality of the FCA response to his investigations, and the detailed explanations provided in order to assist his decision in this case.

Right of appeal

51. Either party has the right to appeal against this decision notice to the First-tier Tribunal (Information Rights). Information about the appeals process may be obtained from:

First-tier Tribunal (Information Rights)
GRC & GRP Tribunals,
PO Box 9300,
LEICESTER,
LE1 8DJ

Tel: 0300 1234504
Fax: 0870 739 5836
Email: grc@justice.gov.uk
Website: www.justice.gov.uk/tribunals/general-regulatory-chamber

52. If you wish to appeal against a decision notice, you can obtain information on how to appeal along with the relevant forms from the Information Tribunal website.
53. Any Notice of Appeal should be served on the Tribunal within 28 (calendar) days of the date on which this decision notice is sent.

Signed

Susan Duffy
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